

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. : CASE NO. 2014-0374
 CYNTHIA BALAS-BRATTON :
 Relator : Original Action in
 : Prohibition
 :
 vs. :
 HON. JON HUSTED, : Expedited election case
 Ohio Secretary of State, et al. : under S.Ct.Prac.R. 12.08
 Respondents :

RELATOR'S S.CT.PRAC.R. 12.08(A) (2) (a) MERIT BRIEF

CRAIG T. CONLEY (#0021585)
 604 Huntington Plaza
 220 Market Avenue South
 Canton, Ohio 44702
 330/453-1900
 330/453-2170 [Fax]
 Counsel for Relator

DAVID M. BRIDENSTINE
 (#0001223)
 110 Central Plaza South,
 Suite 240
 Canton, Ohio 44702
 330/451-7065
 330/451-7906 [Fax]
 Counsel for Respondent
 Stark Cty. Board of Elections

MICHAEL DeWINE (#0009181)
 Ohio Attorney General

RYAN L. RICHARDSON (#0090382)
 *Counsel of Record
ERIN BUTCHER-LYDEN (#0087278)
 Assistant Attorneys General
 Constitutional Offices Section
 30 E. Broad Street, 16th Floor
 Columbus, Ohio 43215
 614/466-2872
 614/728-7592 [Fax]

Counsel for Respondent
 Jon Husted

THOMAS L. ROSENBERG (#0024898)
MICHAEL R. TRAVEN (#0081158)
 PNC Plaza, 12th Floor
 155 East Broad Street
 Columbus, Ohio 43215
 614/463-9770
 614/463-9792 [Fax]

Counsel for proposed Intervenor
 George T. Maier

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RELATOR'S MERIT BRIEF

Now comes Relator, by and through counsel, and hereby respectfully submits her S.Ct.Prac.R. 12.08(A)(2)(a) Merit Brief in support of her Verified Complaint for Writ of Prohibition ("Complaint").

In that regard, Relator incorporates herein by reference her Complaint and her S.Ct.Prac.R. 12.08(A)(2)(a) Submission of Evidence ("Submission") as simultaneously filed herewith; and Relator further incorporates herein by reference this Court's November 6, 2013 Opinion in *The State ex rel. Swanson v. Maier*, 137 Ohio St.3d 400, 2013-Ohio-4767 ("Opinion").

A. INTRODUCTION

Relator respectfully submits, for the reasons set forth hereinbelow, that the relief requested in her Complaint should be granted.

As to Relator's First Claim for Relief, it is respectfully suggested that same presents the threshold issue of a denial of due process before the Stark County Board of Elections ("BOE") and that should that Claim for Relief be granted, this Court need not address Relator's Second Claim for Relief due to mootness.

As to Relator's Second Claim for Relief, it is respectfully suggested that, if this Court "reaches" same, it should again find (as it did via its aforesaid Opinion) that George T. Maier, the subject candidate for Stark County Sheriff ("Candidate Maier"), does not meet the requisite statutory qualifications for that

public office.

Combined Statement of the Facts and of the Case

In the interest of brevity, Relator incorporates herein by reference the Background Facts and General Allegations set forth in her Complaint at paragraphs nos. 3 through 31, inclusive.

However, for this Court's convenience and ready reference, Relator briefly summarizes hereinbelow the chronological sequence of events to date.

On January 28, 2014 (and before expiration of the applicable O.R.C. 311.01(B) qualification date of February 5, 2014), Maier timely filed his "qualification" documents, including his never-thereafter-revised Application for Candidacy ("Application"; Complaint and Submission Exhibit B), with the BOE; on February 11, 2014, Relator timely filed her O.R.C. 3513.05 Protest against Maier's candidacy ("Protest"; Complaint and Submission Exhibit A) with the BOE; on February 21, 2014, the BOE timely heard that Protest, after which there was a tie vote; on March 5, 2014, the BOE timely submitted the matter to the Ohio Secretary of State ("Secretary") to break the tie pursuant to O.R.C. 3501.11(X); on March 7, 2014, the Secretary timely issued his decision ("Secretary's Decision"; Complaint and Submission Exhibit F) breaking that tie vote in favor of denying the Protest; and, on March 11, 2014, Relator timely filed the instant action with this Court.

As to the Secretary's Decision, it is noteworthy that he did not affirmatively decide the issue before him one way or the other.

Instead, the Secretary (as set forth at Complaint paragraph no. 28) found, contrary to this Court's prior jurisprudence (as cited hereinbelow), that O.R.C. 311.01(B)(9) ". . . needs more clarity [and] . . . is in need of rewriting in a manner that is unambiguous" and went on to state "While I am not confident that Mr. Maier meets the legal qualifications in the Ohio Revised Code, I am also unable to clearly conclude he does not"; and, in light of that equivocal statement, the Secretary concluded "Given the law and the facts in this case, I choose to err on the side of ballot access".

Applicable Jurisprudence

As succinctly set forth in this Court's aforesaid Opinion (at ¶ 27), "Thus, to qualify for county sheriff, a candidate must meet the qualifications of R.C. 311.01(B)(8)(a) or (b) as well as R.C. 311.01(B)(9)(a) or (b). In other words, Maier need not meet all four qualifying conditions, but must meet at least one under subsection (B)(8) and one under subsection (B)(9)". (For the instant purposes, O.R.C. 311.01(B)(8), pending a second *quo warranto* action against Maier, is not herein at issue.)

In *State ex rel. Huron County Prosecutor v. Westerhold*, 72 Ohio St.3d 392, 396, 1995-Ohio-86, this Court held "It is the responsibility of courts to enforce the literal language of a

statute ***". (emphasis supplied)

Similarly, in *In re Columbus Skyline Securities, Inc.* (1996), 74 Ohio St.3d 495, this Court re-confirmed the long-standing proposition of law that Courts may neither add to nor delete words from statutory provisions.

Accordingly, noting that under O.R.C. 1.44(B) "'Year' means twelve consecutive months", the requisite "two years" referred to in O.R.C. 311.01(B)(9)(a) means twenty-four consecutive months.

Additionally, specifically as to O.R.C. 311.01(B)(9), as herein at issue before this Court, it is of material (and, it is respectfully suggested, of dispositive) relevance here that this Court has repeatedly found the language of that Revised Code Subsection to be plain and unambiguous and therefore not subject to any need for liberal construction.

For example, in *State ex rel. Wolfe v. Delaware Cty. Bd. of Elections*, 88 Ohio St.3d 182, 186, 2000-Ohio-294, this Court held "'[t]here is no need to liberally construe a statute whose meaning is unequivocal and definite' . . . [and] Given the clarity of the language of R.C. 311.01(B)(9), we need not apply interpretative rules to discern its meaning; we need only apply its unambiguous language".

Thereafter, in *State ex rel. Craig v. Scioto Cty. Bd. of Elections*, 117 Ohio St.3d 158, 2008-Ohio-706 at ¶ 23, this Court, in reliance upon, *inter alia*, *Wolfe, supra*, held ". . . the plain

language of R.C. 311.01(B)(9) . . . has an unequivocal and definite meaning", thereby obviating the need for any "liberal construction of statutory limitations on the right to be an eligible candidate".

Indeed, relevant here as to Maier's O.R.C. 311.01(B)(9)(a) lack of "at least two years of supervisory experience as a peace officer at the rank of corporal or above", in *Wolfe, supra*, this Court held (at 184) that said "supervisory experience must have been earned when the person served as a peace officer at the **rank** of corporal or above" and noted (at 185) that, under that Revised Code Subsection as amended, a rank equivalency is no longer any substitute for actual rank. (emphasis supplied; and see also *State ex rel. Watson v. Hamilton Cty. Bd. of Elections* (2000), 88 Ohio St.3d 239, 241, 242, 200-Ohio-318.)

Subsequently, in *Wellington v. Mahoning Cty. Bd. of Elections*, 117 Ohio St.3d 143, 2008-Ohio-554, this Court held (at ¶ 47) that O.R.C. 311.01(B)(9)(a) requires ". . . that the supervisory experience be earned as a peace officer at a **specified** rank". (emphasis supplied)

In that regard, it is respectfully suggested that Maier is "stuck" with the sworn representations set forth at paragraph 8 of his Application; i.e., that following expiration of the herein applicable qualification date of February 5, 2014, he was not free to retroactively add to or otherwise thereafter "amend" that sworn declaration. (See, e.g., *State ex rel. Grounds v. Hocking Cty. Bd.*

of Elections, 117 Ohio St.3d 116, 2008-Ohio-566, wherein this Court, citing to its prior jurisprudence, held [at ¶ 21] that "the settled rule is that election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision states that it is".)

As to the BOE's role below, it is well established that, in deciding an O.R.C. 3513.05 protest, every County Board of Elections in Ohio has an affirmative duty to behave as a *quasi-judicial* body. (See, e.g., *State ex rel. City of Upper Arlington v. Franklin Cty. Bd. of Elections*, 119 Ohio St.3d 478, 2008-Ohio-5093 at ¶ 16 and *State ex rel. Harbarger v. Cuyahoga Cty. Bd. of Elections* (1996), 75 Ohio St.3d 44, 1996-Ohio-254; and see also O.R.C. 3501.08, the applicable Oath of Office for Board Members.)

It also is well established that "due process entitles an individual in an administrative proceeding to a fair hearing before an impartial tribunal"; and that such due process is denied whenever a *quasi-judicial* tribunal is biased. (*North Coast Payphones, Inc. v. City of Cleveland* (8th Dist.), 2007-Ohio-6814, at ¶ 23; and see, e.g., *Jennings v. Xenia Twp. Bd. of Zoning Appeals* (2nd Dist.), 2007-Ohio-235.)

As to the instant action, this Court's applicable jurisprudence leads to the conclusion that such original actions are, at least in part, "*quasi-appellate*" in that writs in prohibition (and/or in mandamus) will issue if there were an ". . . abuse of

discretion, or clear disregard of applicable legal provisions" below. (See, e.g., *Wolfe, supra*, at 183.)

As alleged in the Complaint at paragraphs nos. 30 and 31 (and as amply demonstrated hereinbelow), "the Secretary engaged in an abuse of discretion and/or in a clear disregard of applicable legal provisions".

However, in light of the equivocating language of the Secretary's Decision (and noting that he therein admitted to erring), it is respectfully suggested that this action is "purely" an original action before this Court, not a "quasi-appeal" to this Court.

In fact, the Secretary essentially so-opined himself and "punted" to this Court by writing in his Decision that same "does not close the door to the ongoing issue of determining [Maier's] qualifications . . . for the office of sheriff, as . . . the Courts . . . may further evaluate George Maier to determine whether he possesses the qualifications to serve as sheriff". (emphasis supplied)

Accordingly, it is respectfully suggested that Relator need not herein affirmatively demonstrate the Secretary's abuse of discretion or clear disregard of applicable legal provisions.

B. ARGUMENT

Relator's First Claim for Relief

As set forth at Complaint paragraph no. 11 and as confirmed

via Submission Exhibit H, prior to the BOE's February 21, 2014 Protest hearing, BOE Member St. John, as a Member of the Stark County Democratic Central Committee ("DCC"), had twice voted, once (pre-ouster) on February 5, 2013 and again (post-ouster) on December 11, 2013, to appoint Candidate Maier to the public office of Stark County Sheriff ("Sheriff").

As also set forth at Complaint paragraph no. 11 and as evinced by Complaint Exhibit C, BOE Member St. John, shortly before the BOE's February 5, 2013 meeting wherein it first appointed Maier Sheriff, signed a letter (authenticated via Submission Exhibit J) on Maier's personal stationery expressing support for Maier's candidacy and urging his fellow DCC Members to join him (and the letter's other signatories) in appointing Maier as ". . . the most qualified person to serve as Stark County Sheriff . . . [who has] . . . the requisite background and necessary managerial experience in law enforcement . . .". (emphasis supplied)

As also set forth at Complaint paragraph no. 11 (and 12) and as evinced by Complaint Exhibit D (authenticated and explained via Submission Exhibit I), BOE Member St. John, after Relator's Protest had been filed with the BOE on February 11, 2014 and before the BOE's subsequent February 21, 2014 hearing thereon, was interviewed by a local newspaper (*The Repository*) reporter on February 12, 2014. (Reference Evid R 902(6), Evid R 1001(1) and (4) and Evid R 1003.)

During that interview, in the context of Relator's then-pending Protest before the BOE and as to Candidate Maier's thereby contested statutory qualifications to be on the May Democratic primary ballot, BOE Member St. John unequivocally stated "I've always believed that he met the qualifications". (Reference Evid R 803(1) and/or (2) and/or (3) and/or Evid R 804(B)(3).)

In short, as appropriately noted by *The Repository* reporter in that same newspaper article (Complaint and Submission Exhibit D), BOE Member St. John, by and through the aforesaid pre-hearing interview, ". . . made it clear where he stands on Maier. He said its time to let voters decide who they want to be sheriff".

In light of all or any of the aforesaid, it is clear that BOE Member St. John, notwithstanding his subsequent grossly disingenuous protestations to the contrary, was, at all times relevant, openly biased and prejudiced in Candidate Maier's favor and had already, before the BOE's February 21, 2014 Protest hearing, made up his mind to vote thereat for denial of Relator's Protest.

Indeed, at the conclusion of that hearing, BOE Member St. John, not surprisingly, moved to deny Relator's Protest and then, also not surprisingly, voted for his own motion. (Hearing Tr. [Submission Exhibit G] at pages 216, 228 and 229.)

In doing so, BOE Member St. John acted in full and consistent accord with his aforesaid two prior DCC votes for Candidate Maier

and/or in full and consistent accord with his aforesaid DCC letter of support for Candidate Maier and/or in full and consistent accord with his aforesaid openly expressed pre-hearing "belief" that Candidate Maier met the subject statutory qualifications.

In the interim, as set forth at Complaint paragraphs nos. 10, 11, 12, 13, 14, 15, 16, 17, 23 and 24 and as evinced by Submission Exhibit K, Relator had made multiple unsuccessful pre-hearing attempts to obtain and/or to cause BOE Member St. John's recusal from voting on or otherwise participating in the BOE's hearing on her Protest; i.e., Relator never waived her constitutional entitlement to due process before the BOE.

In sum, under all or any of the circumstances described hereinabove, it is well beyond dispute that BOE Member St. John was biased and prejudiced in Candidate Maier's favor and was, pre-hearing, already predisposed as to how he would vote on Relator's Protest.

It therefore is quite clear that BOE Member St. John's participation as a voting Member of the BOE effectuated a blatantly unconstitutional denial of Relator's right to due process and otherwise made a mockery of that quasi-judicial body's entire adjudicatory proceeding. (Reference *City of Upper Arlington, Harbarger, North Coast Payphones* and *Jennings, supra.*)

Accordingly, this Court should grant Relator's First Claim for Relief and should direct the Secretary, as Ohio's Chief Elections

Officer, to disallow and not recognize BOE Member St. John's aforesaid motion and subsequent vote to deny Relator's Protest.

Relator's Second Claim for Relief

O.R.C. 2733.14

As a threshold matter, in light of this Court's aforesaid Opinion ousting Maier from the public office of Sheriff, it is respectfully suggested (as set forth in Relator's Protest) that Maier's candidacy here is barred by operation of O.R.C. 2733.14, which provides, in pertinent part, that "When a defendant in an action in quo warranto is found guilty of usurping, intruding into, or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that he be ousted and excluded therefrom, . . .". (emphasis supplied)

As to the aforesaid statutory term "excluded", because that term is not defined in the Revised Code it "shall be read in context and construed according to the rules of grammar and common usage". (Reference O.R.C. 1.42.)

Merriam-Webster's Collegiate Dictionary, Eleventh Edition, defines "exclude" (at page 436, and in pertinent part) as "to prevent or restrict the entrance of; to bar from participation, consideration or intrusion". (emphasis supplied)

The General Assembly, in enacting that Revised Code Section, must be deemed to have intentionally used the conjunctive term "and" between "ousted" and "excluded"; and, as aforesaid, this

Court is obliged as a matter of law "to enforce the literal language of" that statute. (See also O.R.C. 1.47(B) and (D).)

Stated plainly, the General Assembly could have left out the words "and excluded", but did not do so because it appropriately intended to bar usurpers from thereafter being considered for the same public office from which they had been judicially ousted. (Reference *Westerhold* and *Columbus Skyline Securities*, *supra*.)

Accordingly, on that basis alone, it is respectfully suggested this Court should, all other considerations aside, find that Maier, upon his November 6, 2013 ouster by this Court as a Usurper, was and remains excluded and barred from seeking the public office of Stark County Sheriff; i.e., that Maier is, under O.R.C. 2733.14, statutorily ineligible to appear on the May 6, 2014 primary ballot for that position.

O.R.C. 311.01(B)(9)

Via Relator's Protest below, in addition to the aforesaid matters, she challenged Candidate Maier's statutory qualifications under O.R.C. 311.01(B)(9)(a) and (b); and at hearing, Candidate Maier argued that he met both and Relator argued that he met neither. (See Complaint at paragraphs nos. 6, 7 and 8; and see Hearing Tr.)

As to (B)(9)(a), in his Application (as set forth at Complaint paragraph no. 6), Maier relied "solely upon his civilian administrative service with the Ohio Department of Public Safety

as its Assistant Director/Director under an appointment to the Ohio Investigative Unit from July 24, 2008 to July 7, 2011 (with no mention whatsoever of any other subsequent such supposedly 'qualifying' service)".

Under *Wolfe, Watson and Wellington, supra*, for want of a better term, that "rankless" civilian administrative service, which (as stipulated to at hearing by Candidate Maier's counsel at Hearing Tr. page 123) lasted only twenty-three months rather than the requisite full two years/twenty-four months, simply "ain't good enough".

Additionally, although Maier, contrary to *Grounds, supra*, attempted at hearing to "re-do" and belatedly add to his Application, he did so by relying upon similar such subsequent civilian administrative service, which was also "rankless", as well as non-consecutive with his prior twenty-three months of such prior service with the Department of Public Safety.

Therefore, even if, *arguendo*, that subsequent "rankless" civilian administrative service would have, contrary to this Court's aforesaid jurisprudence, otherwise served to "save the day" for Maier, he could not use it because it was not within the requisite two year period of twenty-four consecutive months; and, although he attempted to do so, Maier could not, as a matter of law, include his subsequent (and also non-consecutive) void *ab initio* "service" as the Usurper Sheriff of Stark County.

As to (B) (9) (b), that Revised Code Subsection plainly requires Maier to have "completed satisfactorily at least two years of post-secondary education or the equivalent in semester or quarter hours in a college or university . . . that holds a certificate of registration issued by the state board of career colleges and schools".

Stated plainly, as set forth at Complaint paragraphs nos. 20, 21 and 22, Maier did not, as of the date of the Vogley Affidavit (Complaint and Submission Exhibit E), meet the aforesaid requisite educational requirement; i.e., the "transcript" upon which Maier relied at hearing represented only what Stark State College would "accept as transfer credits" if Maier had completed "at least 18 semester hours . . . in a degree program . . . at Stark", which he never did. (See Vogley Affidavit at paragraphs nos. 8 and 12.)

Indeed, as Maier admitted at hearing, after the date of the Vogley Affidavit, he did not earn any credits at Stark State College toward meeting that requirement. (Hearing Tr. at pages 127 and 128.)

In short, the Vogley Affidavit, combined with Maier's aforesaid admission, presents the proverbial "end of the story" as to O.R.C. 311.01(B) (9) (b).

C. CONCLUSION

For the reasons set forth hereinabove, it is respectfully suggested that this Court should, in light of the aforesaid denial

of due process to Relator, grant her First Claim for Relief and prohibit the Secretary from allowing and recognizing, as lawfully effective, BOE Member St. John's aforesaid motion and subsequent vote to deny Relator's Protest.

In the alternative, also for the reasons set forth hereinabove, it is respectfully suggested that this Court should, upon application of O.R.C. 2733.14, find that Candidate Maier is statutorily ineligible to appear on the May 6 primary ballot as a Democratic candidate for Sheriff and/or that this Court should, upon application of O.R.C. 311.01(B)(9), find that Candidate Maier is not otherwise statutorily qualified to hold the public office of Sheriff; i.e. either way, this Court should prohibit the Secretary and the BOE from including Maier on the May primary ballot (and, if is too late to do so, should prohibit the counting of any votes for Maier as *de jure* non-existent and therefore lawfully ineffective).

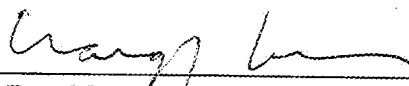
Respectfully submitted,



CRAIG T. CONLEY (#0021585)
Counsel for Relator
604 Huntington Plaza
220 Market Avenue South
Canton, Ohio 44702
330/453-1900
330/453-2170 [Fax]

PROOF OF SERVICE

A copy of the foregoing Merit Brief was served, via hand-delivery, on March 19, 2014, upon all counsel of record herein at the office addresses indicated in this Court's record.



CRAIG T. CONLEY
Counsel for Relator