

FILED
PROBATE COURT
JUVENILE COURT

MAR 30 2022

CRAWFORD COUNTY OHIO

**IN THE COURT OF COMMON PLEAS OF CRAWFORD COUNTY, OHIO
PROBATE DIVISION**

IN RE:

**REMOVAL FROM PUBLIC :
OFFICE FOR MISFEASANCE :
OR MALFEASANCE :**

CAROLYN SHIREMAN

:

Case No. 034675A

Judge Patrick T. Murphy

:

vs.

:

DAN WIREBAUGH

:

**MOTION TO DISMISS
PURSUANT TO CIVIL
RULE 41 (A)(1)(a)**

:

:

Now comes Brian N. Gernert, City of Bucyrus Interim Law Director, and hereby moves this Court for an order dismissing this action pursuant to Ohio Rules of Civil Procedure Rule 41 (A)(1)(a).

Ohio Revised Code §733.72 provides the means in which any elector may file a complaint to remove an elected official from office for misfeasance or malfeasance. Ohio Revised Code §733.73 states that the village solicitor, city law director, or the prosecuting attorney shall appear on behalf of the complainant. The statutory sections in Ohio Revised Code

733 do not provide for individuals' participation in the proceedings. See *In re Pickering*, 25 Ohio App.2d 58, 61-62 (1970).

Statutes that authorize the removal of an elected official are *quasi*-penal in character. *Id.* at 62. The penalty is the removal of the elected official pursuant to Ohio Revised Code of §733.76. As such, it is a public right, not a private right being vindicated. As in a criminal case, only the state can prosecute cases brought under Ohio Revised Code §733.72.

As grounds for said dismissal, movant would state there are ethical concerns, sufficiency of evidence concerns, and sovereign immunity concerns. All of these coupled together make it impossible to proceed in prosecution of this complaint in good faith.

First, as to sufficiency of evidence, a survey of the case law shows significant behaviors that have been prosecuted. These behaviors are much more significant than failing to utilize the exact phraseology of a code section and walking out of a meeting. In *Crane Twp. Ex rel. Stalter v. Secoy*, Township Trustees and the township clerk were removed for misappropriating funds. 103 Ohio St. 258, 261 (1921). The Trustees were committing misfeasance by simply signing off on orders for payment which were blank. *Id.* The Supreme Court wrote "To say that this is negligence does violence to the simplest forms of English. It is malfeasance in office, undoubted dereliction of a clear public duty." *Id.*

Another public official was removed from office by his repeated attendance violations, inconsistencies on his time sheets, and failing to properly do his job regarding the payment of purchase orders. *Betkoski v. Council of Norton*, 2004 Ohio LEXIS 1893, 14-16.

In a different case, the Chief of Police was removed from office in another case of malfeasance and dereliction of duty. *Vajner v. Orange*, 119 Ohio App 227 (1963). In this case the Chief of Police arrested two individuals committing serious offenses against the State. The

evidence was conclusive and the bringing of charges required no further investigation. The Chief of Police released them to obtain the return of some stolen items, only for them to flee and commit additional crimes. The court wrote "Letting them go free, for whatever purpose, under the circumstance of a clear case against them, was in total disregard of the law which he was sworn to uphold... such action constituted malfeasance and misconduct tantamount to gross neglect of duty in office... Id. at 232.

Finally, when looking at the statute itself, Ohio Revised Code §733.72 outlines three areas whereby a municipal officer can be removed. First, when a member has received, directly or indirectly, compensation for his services as a member thereof, or a committee thereof. Second, when a member is or has been interested directly or indirectly, in the profits of a contract, job, work, or service, or has been acting as a commissioner, architect, superintendent, or engineer in work undertaken by the municipal corporation. Last, when a municipal officer has been guilty of misfeasance or malfeasance in the office. When one considers the behavior of the officials in the case law, the prohibition of "insider dealing" in the statute, and Mr. Wirebaugh failing to quote the proper language and leaving a meeting, it is hard to justify pursuing a realistic case of misfeasance or malfeasance. Moreover, "To justify an order removing a public officer, substantial grounds specifically relating to and affecting the administration of his office and directly affecting the rights and interests of the public must exist." *Vajner* at 232. The State cannot prove substantial grounds directly specifically relating to and affecting the administration of Mr. Wirebaugh's official capacity which affecting the rights and interests of the public.

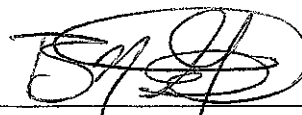
Next, in the analysis into this case, one must consider sovereign immunity. "It is the rule in Ohio that a public officer will not behold liable for errors of judgment in discretionary matters" *Tassel v. Green*, 1981 Ohio App. LEXIS 11206, citing *Scot Lad Foods v. Sec'y of State*,

66 Ohio St. 2d 1 (1981); see also 15 Ohio Jur. 3d 262, Civ. Serv., Sec. 240. Moreover, liability for misfeasance is only applicable to ministerial duties, i.e. those involving no discretion. Id. In the case of Mr. Wirebaugh, leaving a meeting and how to run a meeting are up to his discretion. He has wide latitude and freedom of choice in regards to how the meetings will be handled. As such, sovereign immunity would apply to his actions herein.

The final consideration would be ethical consideration for members of the bar. Attorneys, whether acting in the private or public sector, are constrained by ethical considerations from maintaining frivolous or extremely dubious actions. Ohio Code of Professional Responsibility EC 7-13 states, "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict" Ohio Code of Prof. Resp. EC 7-14. "A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair... A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results." Based upon the foregoing considerations, the Ohio Rules of Professional Conduct and Responsibility constrain me from pursuing this matter any further.

WHEREFORE, based upon what has been presented herein, movant respectfully requests this matter be dismissed pursuant to Ohio Rules of Civil Procedure Rule 41 with prejudice.

Respectfully Submitted,

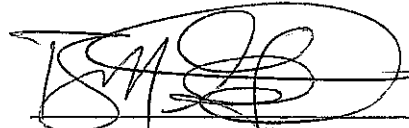
A handwritten signature in black ink, appearing to read "B. Gernett", is written over a horizontal line.

Brian N. Gernett, #0089507
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Dismiss Pursuant to Civil Rule 41(A)(1)(a) was served upon Carolyn Shireman, 1065 E. Beal Avenue, Apartment 54, Bucyrus, Ohio 44820 and upon Dan Wirebaugh, 1092 Martha Avenue, Bucyrus, Ohio 44820 this 30th day of March, 2022 via U.S. Regular Mail.

A handwritten signature in black ink, appearing to read 'B. N. Gernert', written over a horizontal line.

Brian N. Gernert, #0089507
City of Bucyrus Interim Law Director