

collecting a salary, and, that the Office of Sheriff is vacant, thereby granting the Governor of Pennsylvania the right to appoint a replacement.

On March 31, 2017, Reese¹ filed Preliminary Objections wherein he alleges that the Senators lack standing to pursue this action. On April 4, 2017, the Senators responded to those objections.² By Order dated April 5, 2017 the undersigned³ directed an expedited briefing schedule. Briefs for both parties were filed five days later. The Objections are now ripe for disposition.

DISCUSSION

Generally, a quo warranto action is the exclusive means for challenging the title or right to public office. **Reed v. Harrisburg City Council**, 995 A.2d 1137, 1139 (Pa. 2010); **Spykerman v. Levy**, 421 A.2d 641, 649 (Pa. 1980). Citing Pennsylvania Rule of Civil Procedure 1028(a)(5),⁴ Reese requests the Court to dismiss this complaint by averring that the Senators lack capacity to sue. He correctly notes that normally a quo warranto action can only be instituted by the Attorney General of the Commonwealth of Pennsylvania or the local district attorney. A private person, with no special right or interest in the public office at issue, wishing to pursue quo warranto must first seek to have either of those officers pursue the action before proceeding. Only if it would be a futile exercise to seek the approval of those officers, or if those officers decline the request, does the private party then have standing to pursue the action and seek the removal of the holder of the public office at issue. **Reed, supra.**, 995 A.2d at 1139. Reese

¹ Reese is proceeding *pro se*.

² Additionally, the Senators have requested that this matter be expedited.

³ The undersigned was appointed by President Judge Dennis E. Reinaker on March 201, 2017 and by the Supreme Court of Pennsylvania on March 27, 2017 to specially preside over this matter.

⁴ Pa. R.C.P. 1028 provides, in part: " (a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds: ... (5) lack of capacity to sue ..."

suggests that no such request has been made of the Attorney General nor the local district attorney in this matter therefore the Senators have no standing to proceed.

However, a private party with a special, peculiar, or personal interest in the matter, different from his general interest as a member of the public, may seek relief through the means of a quo warranto action without first making a request of the Attorney General or local district attorney. *Id.* Reese contends that the Senators lack any such special interest. Naturally, the Senators argue otherwise. They claim that, in their role as state senators, they have the right and duty to give their advice and consent to any appointment made by the Governor of the Commonwealth to fill a vacancy in the office of county sheriff. They further contend that Reese has created a vacancy in his office by not performing his duties but, by holding himself out as Sheriff, he is denying them the ability to exercise their right, power and duty to give that advice and consent.

The first step in determining whether the Senators have the requisite special interest that provides them standing, involves an examination of their authority if a vacancy does, in fact or law, exist in the Office of Sheriff of Lancaster County.⁵ The County Code provides that each county shall have an elected sheriff. 16 P.S. Sec. 401(a)(10). A vacancy in any county office, such as sheriff, may occur by “death, resignation or otherwise.” 16 P.S. Sec. 409. Furthermore, if the county officer “absconds” from the county the office “shall be vacant for all intents and purposes.” 16 P.S. Sec. 412. When a vacancy occurs, several provisions are applicable. First, the Pennsylvania Constitution provides that “[t]he Governor shall fill vacancies in offices to which he appoints by nominating to the Senate a proper person to fill the vacancy

⁵ There has been no suggestion that the Senators’ districts do not include parts of Lancaster County.

..." and, in turn, "[t]he Senate shall act on each executive nomination ..." Article IV Sec. 8. Second, The Administrative Code provides that "[t]he Governor shall nominate in accordance with the provisions of the Constitution of the Commonwealth of Pennsylvania and, by and with the advice and consent of a majority of the members elected to the Senate appoint persons to fill the following positions: ... vacancies in elective offices ... which he is authorized by law to fill..."⁶ 71 P.S. Sec. 67.1(d)(5.1).

Caselaw cited by the Senators makes clear that the role of state senators in giving their advice and consent in the confirmation process involving gubernatorial nominations to fill vacancies in offices gives them a special interest, and thus standing, in quo warranto proceedings challenging those nominations. For example, in **Stroup v. Kapleau**, 313 A.2d 237 (Pa. 1973), the Governor appointed members to various commissions after the General Assembly had adjourned at the end of the year. Several senators filed a quo warranto action challenging the right of these persons to hold the appointed offices because the Senate had not given its advice and consent as required by the Pennsylvania Constitution.⁷ Our Supreme Court determined that each senator's constitutional right to confirm or reject certain gubernatorial appointees gave them standing because that was an interest aside from their interest as a member of the general public. Shortly thereafter, our Supreme Court again found senatorial standing in **Zemprelli v. Daniels**, 436 A. 2d 1165 (Pa. 1981). There the Governor made an appointment to the State Tax Equalization Board which the Senate approved by a vote of 25-22.

⁶ Prior to 2003, Section 409 of The County Code provided that the Governor's appointee to fill the vacancy of an elected county official would "be confirmed by the Senate if in session." However, that portion of Section 409 was repealed by Act No. 231 of 2002, approved Dec. 30, 2002, which provided that Section 409 of The County Code, insofar as it related to the consent required by the Senate to appointments made by the Governor, was repealed and replaced by provisions of The Administrative Code cited herein.

⁷ Article IV Sec. 8(b).

Several senators who dissented brought a quo warranto action claiming that there was a legal requirement that at least 26 members (a majority of the 50 senatorial positions) were needed to confirm the appointment and that by allowing the vote on a lesser margin their advisory effectiveness had been impaired. Citing **Stroup, supra.**, a challenge to the senators' standing was rejected by the Court. Likewise, state senators overcame an objection to their standing in a quo warranto action in **Zemprelli v. Thornburgh**, 457 A.2d 1326 (Pa. Cmwlth Ct. 1983). There the Governor nominated a person to fill a governmental position and the Senate voted to approve the nominee. Several senators who opposed the nomination filed the action claiming that the nomination was not forwarded to the Senate in accordance with the time requirements of the Pennsylvania Constitution. The Court found that the senators "have a grave stake in assuring that nominations submitted to the Senate will pass constitutional muster." *Id.* at 1329.

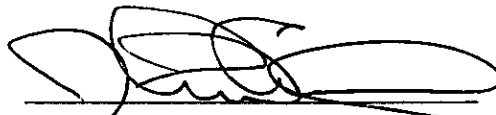
These cases, however, involved factual circumstances significantly different than those facing this Court in the instant matter. As such, they are of very limited precedential value in resolving the issue now pending. In the above cited cases, the office vacancy was not in question. Instead, the vacancies clearly existed and the controversy centered upon the right of the senators, whose standing was at issue, to litigate whether the nomination and approval process passed constitutional scrutiny. In those situations, the senators had a clear interest in preserving their constitutional prerogative. In the matter sub judice, the Senators are requesting the Court to declare the vacancy in the first instance, so that, in turn, and separate and apart from this litigation, the Governor, if he chooses to do so, can forward the name of a nominee to fill that vacancy to the Senate for a vote of its members, which, of course, includes

the senators who filed this action. In the instant action the Senators' constitutional right and duty to exercise their advice and consent are not impaired until first, the vacancy is declared, and second, the Governor exercises his power to nominate a replacement. The difference in these scenarios is distinct and significant. The critical question is whether the Senators' connection to the issue of the vacancy, itself, is too tenuous to allow them to proceed with this litigation. In other words, there is a point on the spectrum of events, beginning with an alleged vacancy in office and ending with a replacement being approved, where the Senators' right to address the gubernatorial nomination would be impacted if they are not granted the right to litigate. As inviting as it may appear to the Senators for this Court to conclude that point exists in the present circumstances, in order to bring finality to the official limbo existing in Lancaster County, to do so would require a stretch not legally justified. Instead, only when a vacancy is declared do the Senators' senatorial interests exceed the interests they have as members of the general public. Consequently, this Court determines that the Senators do not have standing and Reese's Preliminary Objections must be sustained.⁸

⁸ There is no question that the Senators, Reese and the citizens of Lancaster County deserve a determination whether there is, in fact and under the law, a vacancy in the Office of Sheriff. Accordingly, the Court does not fault the Senators for trying to bring the issue to resolution. However, the Court is not empowered to ignore the legitimate objection raised by Reese and the urgency of resolving the question of the vacancy does not lessen the legal standard applicable to the issue of standing. One can only speculate whether the Senators can replead their Complaint in order to overcome the objection sustained herein or whether another party having standing will step forward with an action to challenge Reese's right to office. Other mechanisms may be available to achieve the same result. For example, the Senators mentioned in their Supplemental Brief filed May 11, 2017, that on April 26, 2017 the Pennsylvania House of Representatives unanimously adopted House Resolution 131, the purpose of which is to appoint and empower the House Judiciary Committee to investigate whether Reese should be impeached. Certainly, that process will take some significant time to reach any conclusion. In the interim procedures should be in place to allow for the Sheriff's Department to fulfill its expected functions. We note that The County Code requires the sheriff of each county to appoint a chief deputy with full power and authority to perform any duty incumbent upon the sheriff. 16 P.S. Sec. 1203. Furthermore, "whenever any county officer is authorized or required to appoint a deputy ... such deputy ... shall, during the necessary or temporary absence of his principal, perform all duties of such principal..." 16 P.S. Sec. 408(a). Therefore, all duties incumbent upon the Sheriff of Lancaster County should, if the allegations of the Complaint bear truth, be performed by his deputy during his absence from office.

Accordingly, the attached Order is entered.

BY THE COURT,

A handwritten signature in black ink, appearing to read "John D. Kuhn", written over a horizontal line.

John D. Kuhn, Senior Judge
Specially Presiding

Matthew H. Haverstick, Esq.
Mark S. Reese, pro se

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IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL DIVISION



ORIGINAL

PROTHONOTARY'S OFFICE
LANCASTER, PA.

2017 JUN 22 AM 8:57

ENTERED AND FILED

SCOTT MARTIN, in his official capacity as :
Senator, and Ryan P. Aument, in his :
official capacity as Senator, :
Plaintiffs :

v. :

No. CI-17-01626

MARK S. REESE, :
Defendant :

ORDER OF COURT

AND NOW, this 26th day of May, 2017, for the reasons set forth in the attached Memorandum Opinion the Preliminary Objections filed by Defendant, Mark S. Reese, on March 31, 2017, are hereby granted.

Plaintiffs are granted twenty (20) days from the date of mailing of this Order to file an amended complaint otherwise this matter will be dismissed, with prejudice, as a matter of law without further notice.

BY THE COURT

John D. Kuhn, Senior Judge
Specially Presiding

ATTEST: *Audrey Conrad*
Deputy

Matthew H. Haverstick, Esq.
Mark S. Reese, pro se

NOTICE OF ENTRY OF ORDER OR DECREE
PURSUANT TO PA. R.C.P. NO: 236
NOTIFICATION - THE ATTACHED DOCUMENT
HAS BEEN FILED IN THIS CASE
PROTHONOTARY OF LANCASTER CO., PA
DATE: 6-2-17