

33803
AUG 20 2014 ✓
AGI

Nauman Smith

Attorneys At Law

Please reply to:
P. O. Box 840
Harrisburg, PA 17108-0840

Craig J. Staudenmaier, Esquire
cjstaud@nssh.com
(717) 236-3010, Ext. 22

August 19, 2014

Prothonotary's Office
Perry County Courthouse
Center Square
New Bloomfield, PA 17068

Re: Barbara Hensch, Donna Jones and Kimberly McMullen,
duly elected Auditors of Perry County, PA v. Carl
Nace, Sheriff of Perry County
C.C.P., Perry County, PA - No. 2014-454

Dear Sir/Madame:

Enclosed please find an original and three (3) copies of Plaintiffs' Brief in Opposition to Defendant's Preliminary Objections to Plaintiff's Complaint for filing in the above matter. Please timestamp all, retaining the originals for filing purposes and returning at least one (1) timestamped copy to the undersigned in the envelope enclosed for your convenience.

If you have any questions concerning this request, please advise.

Sincerely yours,



Craig J. Staudenmaier

CJS/jai
Enclosures

cc: Joshua Prince, Esquire, w/enc.
Thomas W. King, III, Esquire, w/enc.
Andrea C. Parenti, Esquire, w/enc.

NAUMAN, SMITH, SHISSLER & HALL, LLP

By: Craig J. Staudenmaier, Esquire

Attorney I.D. No. 34996

cjstaud@nssh.com

Joshua D. Bonn, Esquire

Attorney I.D. No. 93967

jbonn@nssh.com

200 North Third Street, 18th Floor

P. O. Box 840

Harrisburg, PA 17108-0840

T: (717) 236-3010/F: (717)234-1925

Attorneys for Plaintiffs, Barbara
Hench, Donna Jones and Kimberly
McMullen, in their official
Capacity as Auditors of Perry
County, Pennsylvania

Barbara Hench, Donna Jones and
Kimberly McMullen, in their official
capacity as Auditors of Perry County,
Plaintiffs

vs.

Carl Nace, in his official capacity as
Sheriff of Perry County
Defendant

: IN THE COURT OF COMMON PLEAS
: OF THE 41ST JUDICIAL DISTRICT OF
: PENNSYLVANIA PERRY COUNTY BRANCH
:
: NO.: 2014 - 454
:
:
:
: CIVIL ACTION - LAW
:

**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S PRELIMINARY
OBJECTIONS TO PLAINTIFFS' COMPLAINT**

I. PROCEDURAL HISTORY

The Auditors commenced the above-captioned action for declaratory relief against the Sheriff via the filing of a Complaint on June 11, 2014. On July 14, 2014, the Sheriff filed preliminary objections to the Auditor's Complaint under Pa.R.C.P. 1028(a)(2), (a)(3), (a)(4), (a)(5) and (a)(8). The Sheriff's preliminary objections were endorsed with a notice to plead and the Auditors filed a written response thereto on July 31, 2014. The Court entered an Order on July 21, 2014, directing the Auditors to file a brief concerning the issues raised in the preliminary

objections on or before August 21, 2014.¹ Oral argument on the preliminary objections was scheduled for August 28, 2014.

II. STATEMENT OF FACTS

The Auditors are required to audit, settle and adjust the accounts of all county officers (including money collected for use by the Commonwealth) and to make annual reports thereof to the court of common pleas and the Department of Community and Economic Development pursuant to 16 P.S. § 1721(a) and (c) and 16 P.S. § 1724. Complaint, ¶¶ 6-7.

The Sheriff processes uniform applications for licenses to carry concealed firearms (LTCF) and collects and distributes LTCF application fees to Perry County and the Treasury of the Commonwealth pursuant to certain provisions of the Uniform Firearms Act. Complaint, ¶¶ 8-12. The Sheriff maintains a record of the receipt and disbursement of LTCF application fees in a ledger book or similar record. Complaint, ¶ 13. This ledger book or similar record is the only source of information for the receipt of payments of the LTCF application fees. Complaint, ¶ 14.

The Auditors cannot perform their statutory duties under 16 P.S. §§ 1721(a) and 1724 to audit the Sheriff's receipt and disbursement of the LTCF application fees unless the Auditors review the original, unredacted records where the Sheriff records the receipt and disbursement of such fees. Complaint, ¶ 17. The auditors need to review the Sheriff's original, unredacted records to ensure the accuracy of the information in the audit reports that they prepare annually, and, although the Auditors do not suspect any misfeasance by the Sheriff, the Auditors believe and therefore aver that the failure to inspect the original, unredacted ledger is a violation of their statutory duty to the taxpayers of Perry County and the Commonwealth, and, in addition, the

¹ Surprisingly, the Sheriff has not filed nor been ordered to file a brief in support of his objections as the moving party.

inability to audit these records weakens the internal controls endorsed by generally acceptable accounting practices and required by statute. Complaint, ¶¶ 27-28.

Prior to year 2013, the Sheriff provided the Auditors with access to these original, unredacted records to conduct the audits required by 16 P.S. §§ 1721(a) and 1724. Complaint, ¶¶ 18-19. Presently, the Auditors have requested that the Sheriff provide them with access to the complete, unredacted records for the purpose of conducting the statutorily mandated audits for year 2013, Complaint, ¶ 21, and the Sheriff has refused to provide them. Complaint, ¶ 22. The Sheriff alleges that certain provisions of the Uniform Firearms Act (18 Pa.C.S. §§ 6109(l)(2), 6111(g)(3.1), 6111(i)) and 37 Pa. Code § 33.103 prohibit the Sheriff from disclosing the names and addresses of the applicants to the Auditors. Preliminary Objections, ¶¶ 9, 13-16.

The Auditors instituted the instant declaratory judgment action seeking a declaration of the parties' duties, rights, and legal relations under the aforementioned statutes.

III. STATEMENT OF QUESTIONS INVOLVED

- 1. Whether the Court must overrule the Sheriff's preliminary objections under Pa.R.C.P. 1028(a)(2)(scandalous matter) where the Sheriff fails to identify any scandalous matter in the Complaint and where the objection is impermissibly based on disputed facts and facts outside of the face of the Complaint?**

Suggested Answer in the **Affirmative**.

- 2. Whether the Court must overrule the Sheriff's Preliminary Objection under Pa.R.C.P. 1028(a)(3)(insufficient specificity in pleading) where the averments in the Auditors' Complaint are sufficiently clear to enable the Sheriff to prepare a defense?**

Suggested Answer in the **Affirmative**.

- 3. Whether the Court must overrule the Sheriff's Preliminary Objection under Pa.R.C.P. 1028(a)(4)(demurrer) where the provisions of the Uniform Firearms Act cited by the Sheriff do not prevent the Sheriff from allowing the Auditors to review the Sheriff's unredacted records of the receipt and disbursement of LTCF application fees, and where the Sheriff's attempt to bolster his demurrer by**

pleading facts outside of the face of the Complaint constitute a speaking demurrer that cannot be sustained?

Suggested Answer in the Affirmative.

- 4. Whether the Court must overrule the Sheriff's Preliminary Objection under Pa.R.C.P. 1028(a)(5)(lack of capacity to sue) where the Auditors have standing to pursue a claim for relief under the Declaratory Judgment Act?**

Suggested Answer in the Affirmative.

- 5. Whether the Court must overrule the Sheriff's Preliminary Objection under Pa.R.C.P. 1028(a)(8)(full, complete and adequate non-statutory remedy at law) where the Auditors do not have a full, complete or adequate non-statutory remedy at law?**

Suggested Answer in the Affirmative.

IV. ARGUMENT

- 1. The Court must overrule the Sheriff's Preliminary Objection under Pa.R.C.P. 1028(a)(2)(scandalous matter) because the Sheriff fails to identify any scandalous matter in the Complaint and because the objection is impermissibly based on disputed facts and facts outside the face of the Complaint.**

To be scandalous and impertinent, the allegations must be immaterial and inappropriate to the proof of the cause of action. Common Cause/Pennsylvania v. Com., 710 A.2d 108, 115 (Pa.Cmwlth. 1998) *aff'd*, 562 Pa. 632, 757 A.2d 367 (2000). The Sheriff alleges that the Complaint in its entirety and certain paragraphs therein are "scandalous." Preliminary Objections, ¶¶ 22-23. The Auditor's complaint is not scandalous in its entirety. The Auditors request a declaratory judgment based upon the good faith allegation that 16 P.S. §§ 1721(a) and 1724 require the Auditors to audit the original, unredacted records of the Sheriff's receipt and disbursement of LTCF application fees. Complaint, ¶¶ 6-7, 17. The Sheriff's incorrect legal conclusion that certain provisions of the Uniform Firearms Act somehow justify his decision to withhold from the Auditors records necessary to perform their statutory duties does not make the Auditor's Complaint scandalous.

The allegations in paragraphs 18 and 19 of the Auditors' Complaint are not scandalous. Prior to year 2013, the Sheriff provided the Auditors with access to these original, unredacted records so that the Auditors could conduct the audits required by 16 P.S. §§ 1721(a) and 1724, and the Auditors would review the records and then return them to the Sheriff. Complaint, ¶¶ 18-19. The fact that the Sheriff does not want his constituents to know that he has disclosed the requested information to the Auditors in previous years does not make the Auditors' allegations "scandalous."

Furthermore, the Court cannot sustain the Sheriff's preliminary objections under Pa.R.C.P. 1028(a)(2)(scandalous matter) because the objections are based on allegations that are either disputed or outside the face of the Complaint. See Hill v. Ofalt, 2014 PA Super. 17, 85 A.3d 540, 547 (2014); Regal Indus. Corp.v. Crum & Foster, Inc., 2005 PA Super. 425, 890 A.2d 395 (Pa. Super. 2005). The Sheriff disputes the Auditors' averment that the Sheriff previously provided the Auditors with access to the original, unredacted ledger of the receipt and disbursement of LTCF application fees (Complaint, ¶¶ 18-19) by averring that the Sheriff never provided LTCF applicant information to the Auditors. Preliminary Objection, ¶23. The Sheriff further references an incident involving a deputy sheriff in Northampton County who was charged with a crime for releasing LTCF applicant information. Preliminary Objection, ¶21.

The Court cannot resolve the factual dispute about the Sheriff's prior actions at this stage of the proceedings. See Hill, 85 A.3d 540, 547 ("All material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true."). Furthermore, the allegation about the deputy is not only outside the face of the Complaint, but it is misleading. It did not involve the disclosure of LTCF information to the county auditor, but rather involved a deputy sheriff who leaked LTCF applicant information of a political candidate to the candidate's

political opponent. See Northampton county sheriff's deputy charges in leaking license-to-carry-application-UPDATE, Sarah M. Wojcik, The Express-Times, April 18, 2013, available at http://www.lehighvalleylive.com/easton/index.ssf/2013/04/northampton_county_sheriffs_de.html (last visited July 29, 2014).

Not surprisingly, the Sheriff cannot show one instance where a county sheriff has been charged with a crime or subjected to civil liability for disclosing records related to the receipt and disbursement of LTCF application fees to a county auditor or controller, even though such practice appears to be routine throughout the Commonwealth. For example, the Luzerne County Office of Controller recently performed a performance review of the Luzerne County Sheriff's Gun Permit Division. See Performance Review Sheriff's Office Gun Permit for the Period January 1, 2012 to June 30, 2012, available at http://www.luzernecounty.org/uploads/images/assets/county/row_offices/controller/Audit%20Gun%20Permits%202012.pdf (last visited July 29, 2014). During such performance review, members of the Office of Controller "observed the process of issuing gun permits" and "surveyed over 3,600 applications to identify if there were any areas of concern which need to be addressed." Id., p. 2. During the review of the 3,600 applications approved, the Office of Controller noted "there were approximately 400 that were incomplete in one way or another." Id., p. 3.

Thus, this Court must overrule the Sheriff's preliminary objections under Pa.R.C.P. 1028(a)(2)(scandalous matter) because the Sheriff has failed to identify any scandalous matter in the Auditors' Complaint and because the preliminary objections are impermissibly based on disputed facts or facts outside the face of the Complaint.

2. **The Court must overrule the Sheriff's Preliminary Objection under Pa.R.C.P. 1028(a)(3)(insufficient specificity in pleading) because the averments in the Auditors' Complaint are sufficiently clear to enable the Sheriff to prepare a defense.**

Preliminary objections in the nature of a motion for a more specific pleading raise the sole question of whether the pleading is sufficiently clear to enable the defendant to prepare a defense. Unified Sportsmen of Pennsylvania v. Pennsylvania Game Comm'n (PGC), 950 A.2d 1120, 1134 (Pa.Cmwlth. 2008).

The Sheriff alleges that the Auditor's Complaint is insufficiently specific because the Auditors have not averred legal authority to review the LTCF application fee records or that the Auditors have suffered harm from the inability to do so. Preliminary Objections, ¶¶ 28-29. This allegation ignores the express averments in the Auditor's Complaint that set forth the Auditor's statutory duties and the Auditor's good faith belief that review of the original, unredacted records where the Sheriff records the receipt and disbursement of LTCF application fees is necessary to comply with such statutes. See Complaint ¶¶ 6-7, 17, 27-28.

The averments in the Complaint, including the averments highlighted in the previous paragraph, provide sufficient facts for the Sheriff to prepare a defense. In fact, it appears the Sheriff has already prepared a vigorous defense to the Auditors' claims. Thus, the Sheriff's preliminary objections under Pa.R.C.P. 1028(a)(3)(insufficient specificity in pleading) must be overruled. Alternatively, if sustained the remedy is not dismissal of the Complaint but to allow the filing of an amended Complaint. Jones v. City of Philadelphia, 893 A.2d 837, 846 (Pa.Cmwlth. 2006)("[W]here a trial court sustains preliminary objections on the merits, it is generally an abuse of discretion to dismiss a complaint without leave to amend." If it is possible that the pleading can be cured by amendment, a court "must give the pleader an opportunity to

file an amended complaint.... This is not a matter of discretion with the court but rather a positive duty.”)(internal citations omitted).

3. **The Court must overrule the Sheriff’s Preliminary Objection under Pa.R.C.P. 1028(a)(4)(demurrer) because the provisions of the Uniform Firearms Act cited by the Sheriff do not prevent the Sheriff from allowing the Auditors to review the Sheriff’s records of the receipt and disbursement of LTCF application fees, and the Sheriff’s attempt to bolster his demurrer by pleading facts outside of the face of the Complaint constitute a speaking demurrer that cannot be sustained.**

The Sheriff alleges that certain provisions of the Uniform Firearms Act (18 Pa.C.S.A. §§ 6102, 6109(1)(2), 6111(g)(3.1), 6111(i)) and 37 Pa.Code § 33.103 prohibit the Sheriff from allowing the Auditors to review records of the receipt of LTCF application fees for the sole purpose of conducting their statutory audits. Preliminary Objections, ¶¶ 34, 36. The Court should deny the Sheriff’s demurrer because the Sheriff’s legal interpretation of these provisions is incorrect. Furthermore, the Sheriff’s preliminary objection in the nature of a demurrer is premature because there are disputed issues of material fact to be resolved at trial. The Sheriff’s attempt to dispute the facts of the Complaint and assert new facts outside of the face of the Complaint are an improper speaking demurrer that cannot be sustained.

Courts are to apply the following standard when ruling upon a preliminary objection in the nature of a demurrer:

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Schemberg v. Smicherko, 2014 PA Super. 23, 85 A.3d 1071, 1073 (2014).

The Sheriff is incorrect that certain provisions of the Uniform Firearms Act (18 Pa.C.S.A. §§ 6102, 6109(l)(2), 6111(g)(3.1), 6111(i)) and 37 Pa.Code § 33.103 prohibit the Sheriff from allowing the Auditors to review records of the receipt of LTCF application fees for the sole purpose of conducting their statutory audits. 18 Pa.C.S.A. §§ 6102 and 6109(l)(2) apply to inquiries regarding the validity of any Pennsylvania license to carry firearm. The Auditors have made no such inquiries. 18 Pa. C.S.A. § 6111(i) and 37 Pa. Code § 33.103 expressly addresses “public disclosure” of LTCF applicant information. The Auditors are not members of the public, but are rather acting in their official capacity as Auditors and do not publicly release or disclose the records reviewed. 18 Pa. C.S.A. § 6111(g)(3.1) addresses violations related to the “sale or transfer of firearms.” The Auditors request has nothing to do with the sale or transfer of firearms. The Auditors have requested to review the original, unredacted records where the Sheriff records the receipt and disbursement of LTCF application fees in order to comply with their statutory duties under 16 P.S. §§ 1721(a) and 1724. It is absurd to conclude that the Sheriff would be in violation of 18 Pa. C.S.A. § 6111(g)(3.1) by allowing the Auditors to review the such records for the purpose of completing their statutorily required audits.

The Sheriff attempts to bolster his demurrer by alleging facts outside of the face of the Complaint. The Sheriff alleges that Robert W. Morris & Company P.C. performed and perfected an audit utilizing the redacted LTCF applicant financial records without issue or difficulty. Preliminary Objection, ¶ 38. This objection constitutes an improper speaking demurrer which cannot be sustained. A “speaking demurrer” is defined as “one which, in order to sustain itself, requires the aid of a fact not appearing on the face of the pleading objected to, or, in other words, which alleges or assumes the existence of a fact not already pleaded, and which constitutes the ground of objection and is condemned both by the common law and the code system of

pleading.” Regal Indus. Corp. v. Crum & Forster, Inc., 2005 PA Super 425, 890 A.2d 395, 398 (Pa. Super. Ct. 2005) quoting BLACK'S LAW DICTIONARY 299 (6th ed.1991). A “speaking demurrer” cannot be considered in sustaining a preliminary objection. Id.

Furthermore, it is denied that Mr. Morris was able to “perfect” an audit utilizing the Sheriff’s redacted records. Mr. Morris’ audit does not comply with the requirements of 16 P.S. §§ 1721(a) and 1724 or with the internal controls endorsed by generally acceptable accounting practices because Mr. Morris is not an elected, statutorily authorized auditor for Perry County and he did not review the complete, original, unredacted records where the Sheriff records the receipt and disbursement of LTCF application fees.

This Court must overrule the Sheriff’s preliminary objections under Pa.R.C.P. 1028(a)(4)(demurrer) because the Uniform Firearms Act does not prohibit the Sheriff from allowing the Auditors to review the original, unredacted records where the Sheriff records the receipt and disbursement of LTCF application fees for the purpose of conducting statutorily required audits. The Sheriff’s attempt to bolster his demurrer by alleging facts outside of the face of the Complaint constitutes a speaking demurrer that cannot be sustained.

4. The Court must overrule the Sheriff’s Preliminary Objection under Pa.R.C.P. 1028(a)(5)(lack of capacity to sue) because the Auditors have standing to pursue a claim for relief under the Declaratory Judgment Act.

Under 42 Pa.C.S. § 7533, any person whose rights or other legal relations are affected by a statute may have determined any question of construction or validity and obtain a declaration of rights or legal relations thereunder. Unified Sportsmen of Pennsylvania v. Pennsylvania Game Comm’n (PGC), 950 A.2d 1120, 1132 (Pa.Cmwlth. 2008). In order to sustain an action under the Declaratory Judgments Act, a plaintiff must demonstrate an “actual controversy” indicating imminent and inevitable litigation, and a direct, substantial and present interest. Id.

The averments in the Complaint are sufficient to establish that the Auditors have standing to pursue a declaratory judgment action. The Auditors have a direct, substantial and present interest in the action because they cannot perform their statutory duties under 16 P.S. §§ 1721(a) and 1724 to audit the Sheriff's receipt and disbursement of the LTCF application fees unless they review the original, unredacted records where the Sheriff records the receipt and disbursement of such fees, Complaint, ¶ 17. There is an actual controversy because the Sheriff has refused to provide the Auditors with access to the necessary records, Complaint, ¶ 22.

The Sheriff's refusal has a detrimental effect on Auditors' rights and duties under 16 P.S. §§ 1721(a) and 1724. Court have found that public officials have the right to seek declaratory relief in similar circumstances. See Zemprelli v. Thornburg, 47 Pa.Cmwlth. 43, 60, 407 A.2d 102, 110 (1979)(state Senator had right to seek declaratory relief where Governor failed to nominate candidates for vacant offices within constitutionally mandated period); Cohen v. Rendell, 684 A.2d 1102, 1105 (Pa.Cmwlth. 1996)(city council member had a legal interest in enforcing the voting procedures established by the city's home rule charter). Morris v. Goode, 107 Pa.Cmwlth. 529, 538, 529 A.2d 50, 55 (1987)(city council members had standing to seek declaratory relief to enforce provision of city's home rule charter that required council to have quorum of members present to vote on council resolutions). Thus, the Court must overrule Sheriff's preliminary objections under Pa.R.C.P. 1028(a)(5).

5. The Court must overrule the Sheriff's Preliminary Objection under Pa.R.C.P. 1028(a)(8)(full, complete, and adequate non-statutory remedy at law) because the Auditors do not have a full, complete or adequate non-statutory remedy at law.

Defendant's counsel appears to misunderstand the legal basis for the preliminary objection for full, complete and adequate non-statutory remedy at law because he has failed to identify what action at law is available to the Plaintiffs. See Fastuca v. L.W. Molnar &

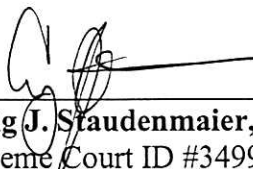
Associates, 608 Pa. 187, 214, 10 A.3d 1230, 1246 (2011))("[equitable] jurisdiction and in furtherance of justice will afford relief if the statutory or legal remedy is not adequate, or if equitable relief is necessary to prevent irreparable harm."; "if a sufficient legal remedy exists 'a court is divested of equity jurisdiction.'")(internal citations omitted). The Sheriff's assertion that the Auditors can perfect an audit utilizing the redacted information provided by the Sheriff, Preliminary Objection, ¶45, is not a remedy at law; furthermore, even if it were a remedy at law, such remedy would be inadequate and would cause the irreparable harm described in Complaint, ¶¶ 27-28.

V. CONCLUSION WITH REQUESTED RELIEF

Plaintiffs, Barbara Hench, Donna Jones and Kimberly McMullen, respectfully request the entry of an Order Overruling the Defendant's Preliminary Objections and directing the Defendant to file an answer to the Plaintiff's complaint within twenty days of the entry of said order.

NAUMAN, SMITH, SHISLER & HALL, LLP

By: _____


Craig J. Staudenmaier, Esquire
Supreme Court ID #34996

Joshua D. Bonn, Esquire
Supreme Court ID#93967

200 North Third Street, 18th Floor
P. O. Box 840
Harrisburg, PA 17108-0840
Phone: 717-236-3010
Fax: 717-234-1925
Attorneys for Plaintiffs, Barbara Hench, Donna
Jones and Kimberly McMullen

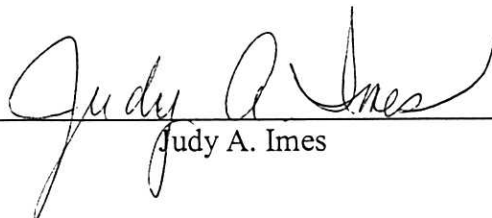
Date: August 19, 2014

CERTIFICATE OF SERVICE

AND NOW, on the date stated below, I, Judy A. Imes, an employee of the firm of Nauman, Smith, Shissler & Hall, LLP, hereby certify that I this day served the foregoing "Plaintiffs' Brief in Opposition to Defendant's Preliminary Objections to Plaintiffs' Complaint " by depositing a copy of the same in the United States Mail, first class, postage prepaid, at Harrisburg, Pennsylvania, addressed to the following:

Joshua Prince, Esquire
Prince Law Offices
646 Lenape Road
Bechtelsville, PA 19505

Thomas W. King, III, Esquire
Andrea C. Parenti, Esquire
Dillion McCandless King Coulter & Graham, L.L.P.
128 West Cunningham Street
Butler, PA 16001



Judy A. Imes

Date: August 19, 2014