

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WILLIAM J. GREEN, IV., *Individually* :
and in his official capacity as Chairman of :
the School Reform Commission, :

Petitioner : **No. 256 MD 2016**

v. :

THOMAS W. WOLF, *in his official* :
capacity as Governor of the Commonwealth :
of Pennsylvania, **SCHOOL REFORM** :
COMMISSION OF THE SCHOOL :
DISTRICT OF PHILADELPHIA, *and* :
MARJORIE NEFF, :

Electronically Filed Document

Respondents :

**GOVERNOR WOLF’S BRIEF IN OPPOSITION TO PETITIONER’S
BRIEF IN SUPPORT OF ANSWER TO NEW MATTER**

Respectfully submitted,

BRUCE L. CASTOR, JR
First Deputy Attorney General

By: */s/Kenneth L. Joel*
KENNETH L. JOEL
Chief Deputy Attorney General
Attorney I.D. #72370

Office of Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
Direct: 717-787-8106
[**kjoel@attorneygeneral.gov**](mailto:kjoel@attorneygeneral.gov)

Counsel for Respondent Governor
Thomas W. Wolf

Date: August 2, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REPLY2

A. The chair of the PSRC is not a separate and distinct public or civil office.....2

B. The General Assembly did not limit Governor Wolf’s ability to replace the chair of the PSRC6

C. Petitioner has failed to properly and timely plead his causes of action10

CONCLUSION14

TABLE OF AUTHORITIES

CASES:

<i>Aiken v. Radnor Township Board of Supervisors</i> , 476 A.2d 1383 (Pa. Cmwlth. 1984).....	10, 12
<i>Arneson v. Wolf</i> , 124 A.3d 1225 (Pa. 2015).....	8, 9
<i>Arneson v. Wolf</i> , 117 A.3d 374 (Pa. Cmwlth. 2015).....	8, 9
<i>Bowers v. PLRB</i> , 167 A.2d 480 (Pa. 1961).....	11
<i>Burger v. School Board of McGuffey School District</i> , 923 A.2d 1155 (Pa. 2007).....	4
<i>Commonwealth v. Wright</i> , 14 A.3d 798 (Pa. 2011).....	4
<i>Curley v. Wetzel</i> , 82 A.3d 418 (Pa. 2013).....	11, 12
<i>First Union National Bank v. Estate of Shevlin</i> , 897 A.2d 1241 (Pa. Super. 2006).....	4
<i>Funk v. Wolf</i> , ___ A.3d ___, 2016 WL 4017756 (Pa. Cmwlth. July 26, 2016).....	11
<i>Gernert v. Lindsay</i> , 2 Pa. Cmwlth. 576 (1971).....	11
<i>Halko v. Board of Directors</i> , 97 A.2d 793 (Pa. 1953).....	4
<i>Kmonk-Sullivan v. State Farm Mutual Auto Insurance Co.</i> , 788 A.2d 955 (Pa. 2001).....	4

TABLE OF AUTHORITIES – CONT’D.

CASES:

Kuznik v. Westmoreland County Board of Commissioners,
902 A.2d 476 (Pa. 2006), *app. denied*, 599 Pa. 684 (2008) 13

Mazin v. Bureau of Professional and Occupational Affairs,
950 A.2d 382 (Pa. Cmwlth. 2008) 13

Snyderwine v. Craley,
254 A.2d 16 (Pa. 1969) 3

Spykerman v. Levy,
421 A.2d 641 (Pa. 1980) 10

Stilp v. Commonwealth,
910 A.2d 775 (Pa. Cmwlth. 2006) 13

Township of Bensalem v. Moore,
620 A.2d 76 (Pa. Cmwlth. 1981) 12

Unified Sportsmen of Pennsylvania v. Pennsylvania Game Commission,
903 A.2d 117 (Pa. Cmwlth. 2006) 11

Watson v. Pennsylvania Turnpike Commission,
125 A.2d 354 (Pa. 1956) 11

Werner v. Zazyczny,
681 A.2d 1331 (Pa. 1996) 3

PENNSYLVANIA CONSTITUTION:

Article VI, Section 7 3, 4, 5, 6, 7

TABLE OF AUTHORITIES – CONT’D.

STATUTES:

24 P.S. § 4-427 5
24 P.S. § 6-696 7
24 P.S. § 6-696(a) 3
24 P.S. § 6-696(b) 3
24 P.S. § 6-696(b.1) 5
24 P.S. § 6-696(b.2) 5
24 P.S. § 6-696(c) 5
24 P.S. § 6-696(d) 5
24 P.S. § 6-696(e) 5
24 P.S. § 6-696(h) 5
24 P.S. § 6-696(i) 5
24 P.S. § 6-696(j) 5
24 P.S. § 6901.304(c) 2
53 P.S. § 28202(b) 2
55 P.S. § 697.5(f) 2
1 Pa.C.S. § 2310 12
42 Pa.C.S. § 5522 12
74 Pa.C.S. § 8105(e) 2

RULES:

Pa. R. App. P. 2113(a) 1
Pa. R. App. P. 2113(c) 1

INTRODUCTION

On July 19, 2016, Petitioner filed an Answer to New Matter and a Brief in Support of that Answer. We understand the need to answer our New Matter; however, Petitioner’s Brief—supporting his Answer to New Matter—is an unorthodox filing that is not contemplated by the Pennsylvania Rules of Appellate Procedure. *See* Pa. R. App. P. 2113(a) (allowing for a reply brief); Pa. R. App. P. 2113(c) (noting no further briefs without leave of court). Perhaps Petitioner means his filing to be a Reply Brief supporting his Amended Application for Summary Relief (since it was filed 14 days after our Opposition Brief).¹ In case Petitioner’s “Brief in Support” is deemed to be something other than a Reply Brief, we tender this short Opposition Brief.²

Petitioner’s Brief in Support is peppered with rhetorical attacks. For example, Petitioner calls our arguments “smoke and mirrors” and “laughable” and “duplicitous” and “bizarre” and he even states that “Gov. Wolf fails to fully appreciate” the Pennsylvania Constitution and the relevant cases. *See, e.g.*, Pet. Br.

¹ We also filed Preliminary Objections and a Brief in Support of those Preliminary Objections. Should Petitioner file an Opposition Brief to our Preliminary Objections, we will submit a Reply Brief in accordance with Rule 2113(a).

² We previously filed a Brief in Opposition to Petitioner’s Amended Application for Summary Relief and incorporate, but will not repeat, those arguments herein. Instead, we will respond only to those points made in Petitioner’s recent submission.

Supp. Ans. at 1, 3, 6, 9, 9 n.11.³ Rather than answering our compelling arguments, these flourishes only underscore the baselessness of Petitioner’s position. Petitioner remains a member of the Philadelphia School Reform Commission (“PSRC”) and nothing in the statute, the Pennsylvania Constitution, or case law limits Governor Wolf’s ability and authority to replace the chair of the PSRC.

REPLY

A. The chair of the PSRC is not a separate and distinct public or civil office.

Petitioner rehashes his contention that the chair is a separate and distinct public office or civil office. Petitioner’s support for this claim veers wide of the mark.

First, Petitioner cites to other statutes where the General Assembly has used the word “chair” and “office” in close proximity to each other and concludes that this means that all chairs are offices. Pet. Br. Supp. Ans. at 2 (citing 24 P.S. § 6901.304(c); 53 P.S. § 28202(b); 55 P.S. § 697.5(f); 74 Pa.C.S. § 8105(e)).⁴ Of

³ We really do not understand what point Petitioner is trying to make by truncating Governor Wolf’s title but he does it over and over again.

⁴ These are the same four statutes that Petitioner cited in their previous filings and, thus, we must conclude that Petitioner was unable to locate any other examples to support his position. Further, these four statutes not only use the words “office” and “chair” in proximity to each other but these laws grammatically link the two. *See* 24 P.S. § 6901.304(c) (“...vacancy in the *office of chairperson*”); 53 P.S. § 28202(b) (“...vacancy in the *office of chairperson*”); 55 P.S. § 697.5(f) (“...*office of the chairman* is vacant”); 74 Pa.C.S. § 8105(e) (“...*the office of chairman*”) (emphasis added).

course just because the General Assembly links these words together does not mean that a chair is a separate and distinct public or civil office for purposes of Article VI, Section 7 of the Pennsylvania Constitution and cases articulating the standard to establish such an office. *See Werner v. Zazyczny*, 681 A.2d 1331, 1337 (Pa. 1996) (“[a] person will be deemed a public officer if the person is appointed or elected to perform duties of a grave and important character, and which involve some of the functions of government, for a definite term”) (citing *Snyderwine v. Craley*, 254 A.2d 16, 19-20 (Pa. 1969)).

Further, even assuming that the structural connection in other statutes of these two words transforms the chair of these other bodies into a separate and distinct public and civil office, the fact is that the existence of these statutes only proves Governor Wolf’s point. Put simply, unlike the four statutes on which Petitioner relies, here the General Assembly did not articulate that there was an “office of the chair” for the PSRC. In fact, the statute at issue in this litigation locates the words “chair” and “office” far away from each other. *See* 24 P.S. § 6-696(a) (including the word “chair”); 24 P.S. § 6-696(b) (including the word “office”). In fact, the two words are separated by nearly 200 words and almost 10 subsections.

Petitioner cannot have this Court rewrite the statute—to delete and replace the nearly 200 intervening words and many subsections with the word “of”—to his

liking. See *First Union National Bank v. Estate of Shevlin*, 897 A.2d 1241, 1245 (Pa. Super. 2006) (court “cannot rewrite statute under the pretext of interpreting it”) (citing *Halko v. Board of Directors*, 97 A.2d 793 (Pa. 1953)); see also *Commonwealth v. Wright*, 14 A.3d 798, 814 (Pa. 2011) (this canon of statutory construction equally requires this Court not only to abide by what was written but to accept what was not written); *Kmonk-Sullivan v. State Farm Mutual Auto Insurance Co.*, 788 A.2d 955, 962 (Pa. 2001).

Second, Petitioner cites to *Burger v. School Board of McGuffey School District*, 923 A.2d 1155 (Pa. 2007) and concludes that because a superintendent of a school district may be an “officer” for purposes of Article VI, Section 7, Petitioner—the chair of the PSRC—is also an officer for purposes of this constitutional provision. *Burger* is of no help to Petitioner. In that regard, in *Burger*, the question of whether the superintendent was an “officer” for purposes of Article VI, Section 7 analysis was not raised or disputed by the parties. 923 A.2d at 1161 & n.6 (“we leave the consideration for a future case that squarely presents the issue before us”). Further, in *Burger*, the superintendent had been removed completely as the superintendent and here, by contrast, Petitioner still serves as a member of the PSRC. Moreover, the actual issue in *Burger* was whether a statute that required cause for the removal of the holder of a state-

created office was constitutional in light of Article VI, Section 7 and that is not the issue presented by Petitioner here.

Third, Petitioner tries to elevate the chair. As we discussed in our previous filings, the statute at issue vests power in the PSRC and requires a majority of a quorum before any action may be taken. *See, e.g.*, 24 P.S. § 6-696(b.1); 24 P.S. § 6-696(c); 24 P.S. § 6-696(d); 24 P.S. § 6-696(e); 24 P.S. § 6-696(h); 24 P.S. § 6-696(i). Other than the initially appointed interim chair—who serves for no more than 30 days—the chair is provided with no power under the statute. *See* 24 P.S. § 6-696(b.2).⁵

Fourth, Petitioner resorts to the PSRC’s by-laws and Robert’s Rules of Order and deems these materials to be “well-accepted authority.” Petitioner, once again, misses the point. The statute at issue is very specific. The PSRC is vested with power over the school district and it only acts pursuant to a vote of its majority. The statute—with the exception of the 30-day interim chair—provides absolutely no power in the chair. Case law has defined the needed attributes for a civil or public office and the statute fails to vest the chair of the PSRC with these attributes. Indeed, by-laws—which may be changed or waived—and Robert’s

⁵ Petitioner’s reference to 24 P.S. § 4-427 does not alter this conclusion. That provision sets forth the duties of a school board president and the school board members continue in their roles despite the existence of the PSRC. *See* 24 P.S. § 6-696(j).

Rules of Order—which may be rejected or waived—do not trump the standard articulated by the Pennsylvania Supreme Court.

Fifth, merely because a single piece of paper—the oath of office—includes the word “chair” does not transform the chair of the PSRC into a separate and distinct public and civil office for purposes of Article VI, Section 7 and precedential cases interpreting that constitutional mandate.⁶ Petitioner was nominated by then-Governor Corbett to be a member of the PSRC. The Senate voted favorably on Petitioner’s appointment as a member of the PSRC. Petitioner received his commission noting that he was a member of the PSRC. He then was named the chair weeks after.

In sum, Petitioner’s position—that the chair of the PSRC is somehow a separate and distinct civil or public office—is without merit.

B. The General Assembly did not limit Governor Wolf’s ability to replace the chair of the PSRC.

As to our argument that the General Assembly did not limit Governor Wolf’s ability to replace the chair of the PSRC, Petitioner makes only a couple of points.⁷

Frist, he suggests that because we pressed arguments relating to Article VI, Section 7, we have conceded that the chair is a public and civil office for purposes

⁶ We do not know who included that word on this paper.

⁷ Petitioner left many of our arguments unanswered. His failure constitutes waiver.

of this constitutional provision. To be clear, Governor Wolf’s position is that the chair of the PSRC is not a separate and distinct public or civil officer. With or without Article VI, Section 7, then, there is absolutely no limit on the ability of Governor Wolf to replace the chair. Stated a bit differently, because the chair is not a civil or public office, the constitutional provision does not even apply and Governor Wolf needed to invoke nothing to replace Petitioner as the chair of the PSRC. Assuming, however, that this Court concludes that the chair of the PSRC is a separate and distinct civil and public officer, then our position—as argued before—is that the General Assembly did not limit the ability of Governor Wolf to replace the chair and, therefore, the constitutional default—Article VI, Section 7—governs and the chair may be replaced at the pleasure of the Governor.

Second, Governor Wolf does not “fail[] to fully appreciate” the issue in this case. To that end, we discussed—at length—the language of 24 P.S. § 6-696 and the cases interpreting Article VI, Section 7 of the Pennsylvania Constitution. For example, we explained that, with the exception of the initially appointed 30-day interim chair, the statute provides the chair of the PSRC with no power and no term. Moreover, we showed that the chair is not linked to any particular member and, thus, even if the term of the member could be imputed to the chair, it would not necessarily stagger with the appointing authority. We also highlighted the fact that there is a specific standard and process for removing a member from the PSRC

but that Petitioner has not been removed as a member from the PSRC. And this removal provision, quite clearly, is linked to membership on the PSRC—not to being the chair or vice-chair or secretary or treasurer.

Third, Petitioner tries to minimize Governor Wolf’s position to no more than a disagreement with precedent. Our disagreement with the *Arneson* opinions is based on our continued belief that, in the context of the Right to Know Law, the General Assembly did not limit the Governor’s ability to remove the executive director of the Office of Open Records—but that is not the point.

Without doubt, this Court’s opinion and the Supreme Court’s decision in *Arneson* did not establish any new analytical framework. Without doubt, the *Arneson* decisions were grounded in the unique and *sui generis* status of OOR and its executive director—“[j]ust as the OOR is inherently *sui generis*, the Commonwealth Court’s analysis is narrow and unique to the OOR and its Executive Director.” *Arneson v. Wolf*, 124 A.3d 1225, 1228 (Pa. 2015); *see also Arneson v. Wolf*, 117 A.3d 374, 376 (Pa. Cmwlth. 2015) (noting that OOR is “unique and *sui generis*”). Without doubt, the *Arneson* decisions were grounded in the conclusion that OOR, and its Executive Director, were independent quasi-judicial agencies that reviewed decisions relating to the disclosure of Executive Branch documents—including the Governor’s documents. And, without doubt, the *Arneson* decisions were grounded in the conclusion the executive director had

independent and quasi-judicial powers and had a specific term that was staggered with his/her appointer. Here, by contrast, the provision at issue contains none of the attributes that the *Arneson* decisions found to be compelling.

And, in the end, Petitioner’s position is wholly based on the presence of the phrase “from office” in a single provision of the statute. As we previously explained, this phrase does not appear when the statute is talking about the process that must be followed for the removal of a member of the PSRC. Thus, Petitioner’s reading of this singular phrase would be absurd—the chair could be replaced on a clear and convincing showing of misfeasance or malfeasance but the chair would not be entitled to any process while other members would get process but could be removed at will. Moreover, as discussed above, the word “office” is far removed from the word “chair.” And beyond this, the fact is that the “from office” is part of a sentence that states: “no commission member may be removed from office during a term” and, thus, the appropriate reading is that “office” relates to being a member of the PSRC and not being the chair or vice-chair or secretary or treasurer. In the end, we are neither ignoring this word nor are we asking this Court to do so. In fact, the language chosen by the General Assembly makes clear that Governor Wolf’s ability to replace the chair of the PSRC has not been limited.

C. Petitioner has failed to properly and timely plead his causes of action.

Petitioner's contorting of our technical arguments only serves to highlight the fact that Petitioner has untimely pled the wrong legal theories.

Governor Wolf replaced Petitioner as the chair with Ms. Neff. Ms. Neff was appointed to the chair in the same way as Petitioner—a letter. Petitioner, therefore, is challenging who is the legal holder of the chair—him or Ms. Neff. Case law is clear that this dispute sounds in quo warranto. *Spykerman v. Levy*, 421 A.2d 641 (Pa. 1980). Therefore, the case that should have been brought—but was not until some 14 months after Petitioner's replacement as chair of the PSRC—is *Green v. Neff*. Petitioner has no claim in quo warranto against Governor Wolf and Petitioner's claim—in Count I against Governor Wolf—must be dismissed.⁸

As for the mandamus claim against Governor Wolf, the cases Petitioner uses miss the mark. For example, in *Arneson*, the executive director of OOR was removed totally from that position and throughout the litigation nobody was appointed to fill that position. The same is true in *Bowers v. PLRB*, 167 A.2d 480

⁸ We realize that Petitioner is not seeking to be Governor of the Commonwealth—and this is precisely the point. A private quo warranto action against Governor Wolf would necessarily be a challenge by one who believes he/she is properly the Governor and would necessarily seek to remove Governor Wolf from his position. *See, e.g., Aiken v. Radnor Township Board of Supervisors*, 476 A.2d 1383, 1386 (Pa. Cmwlth. 1984) (a private party must have a special interest in the position to bring a private quo warranto claim). This is why the quo warranto claim against Governor Wolf is baseless.

(Pa. 1961) and *Watson v. Pennsylvania Turnpike Commission*, 125 A.2d 354 (Pa. 1956). And, in *Gernert v. Lindsay*, 2 Pa. Cmwlt. 576 (1971), while a person had been named as a replacement, he had not been confirmed by the Senate and, thus, the position was vacant.⁹

Mandamus is an extraordinary remedy that is designed to compel the performance of a ministerial act or mandatory duty. *Unified Sportsmen of Pennsylvania v. Pennsylvania Game Commission*, 903 A.2d 117, 125 (Pa. Cmwlt. 2006). Mandamus will only issue where the petitioner has a clear legal right to enforce the performance of the ministerial act or mandatory duty, the respondent has a correspondingly clear duty to act, and the petitioner has no other adequate remedy. *Id.* Mandamus may not be used, moreover, to establish legal rights. *Id.*

As relevant here, then, the issue is whether the statute in question imposes a specific and mandatory duty onto Governor Wolf to perform the specific act—reinstating Petitioner to the chair—that Petitioner seeks. *See also Funk v. Wolf*, --- A.3d ---, 2016 WL 4017756, *15 (Pa. Cmwlt. July 26, 2016). It does not. Petitioner merely claims that Governor Wolf improperly replaced him as chair of the PSRC and the statute at issue provides no mandatory duty on Governor Wolf to reinstate Petitioner. *See also Curley v. Wetzel*, 82 A.3d 418 (Pa. 2013) (Castille,

⁹ Significantly, in both *Bowers* and *Watson*, the ousted person did not sue the Governor. Instead, the entity was sued in mandamus for an order that the entity must seat and recognize the person as a member of the entity. Here, mandamus just does not make sense as against Governor Wolf.

C.J., concurring). Mandamus, therefore, provides Petitioner with no cause of action against Governor Wolf.¹⁰

Petitioner's statute of limitations counter misses the point also. Petitioner was replaced as the chair in March of 2015 and Ms. Neff was installed as the chair in March of 2015. Since that time, Ms. Neff has held the chair and Petitioner has not—although, he has remained as a full member of the PSRC. Now, more than a year later, Petitioner finally sues and demands that this Court remove Ms. Neff from the chair and order Petitioner back into it. This is an action against a governmental official and, thus, is governed by 42 Pa.C.S. § 5522. *See also Township of Bensalem v. Moore*, 620 A.2d 76 (Pa. Cmwlth. 1981) (holding that 6-month statute of limitations governed mandamus action by terminated employee in an action challenging the failure to provide process before the termination).¹¹

¹⁰ Petitioner's real claim against Governor Wolf is that Governor Wolf purportedly violated this statute by replacing him as chair. The statute at issue provides Petitioner with no private right of action and, moreover, even assuming that being replaced as the chair was tantamount to an improper demotion—a cause of action that has not been alleged—Governor Wolf enjoys sovereign immunity from such intentional tort claims. *See* 1 Pa.C.S. § 2310.

¹¹ Thus, this case is far different than *Curley v. Wetzel*, which arose in the deduction of inmate account context. And, Petitioner's analogy to a Commonwealth Court judge who is not member of the bar misses the mark since, here, there was a definitive action—replacing Petitioner as chair—that triggered any possible claim. Indeed, it is only because Petitioner alleges some type of specific interest that he has standing to bring a quo warranto action at all. *See, e.g., Aiken v. Radnor Township Board of Supervisors*, 476 A.2d 1383, 1386 (Pa. Cmwlth. 1984).

As for the declaratory judgment argument, our position is quite clear. Petitioner possibly had the ability to sue Ms. Neff in a quo warranto action and then also sue the PSRC to seat him as the chair—if he succeeded against Ms. Neff. Petitioner did not do so in a timely way and, thus, is now barred from doing so. Petitioner cannot resuscitate time-barred causes of action through the use of the declaratory judgment act. *See Stilp v. Commonwealth*, 910 A.2d 775 (Pa. Cmwlth. 2006) (holding that declaratory judgment claim may only be made where there is a concrete and actual controversy).

Because Petitioner has no clear right to relief, because he has failed to articulate any injury or damage, because he remains a member of the PSRC entitled to the same single vote as he had before, and because what he asks for would prevent the Governor from exercising his constitutional duties, he is not entitled to permanent injunctive relief. *Mazin v. Bureau of Professional and Occupational Affairs*, 950 A.2d 382, 389 (Pa. Cmwlth. 2008) (citing *Kuznik v. Westmoreland County Board of Commissioners*, 902 A.2d 476 (Pa. 2006)), *app. denied*, 599 Pa. 684 (2008).

CONCLUSION

For these reasons, then, this matter should be dismissed with prejudice.

Respectfully submitted,

**BRUCE L. CASTOR, JR
First Deputy Attorney General**

**By: /s/Kenneth L. Joel
KENNETH L. JOEL
Chief Deputy Attorney General
Attorney I.D. #72370**

*Counsel for Respondent Governor
Thomas W. Wolf*

**Office of Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
Direct: 717-787-8106
Fax: 717-772-4526
kjoel@attorneygeneral.gov**

Date: August 2, 2016

CERTIFICATE OF SERVICE

I, Kenneth L. Joel, Chief Deputy Attorney General, hereby certify that on August 2, 2016, I caused to be served the foregoing Brief in Opposition to the following:

VIA ELECTRONIC FILING

**David Randel Osborne, Esquire
Karin Moore Sweigart, Esquire
The Fairness Center
225 State Street, Suite 303
Harrisburg, PA 17101
david@fairnesscenter.org
karin@fairnesscenter.org
*Counsel for Petitioner William J.
Green***

**Miles H. Shore, Esq.
The School District of Philadelphia
440 North Broad Street
Suite 313
Philadelphia, PA 19130
*Counsel for School Reform
Commission and Marjorie Neff***

**/s/ Kenneth L. Joel
KENNETH L. JOEL
Chief Deputy Attorney General**

**Office of Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
Direct: 717-787-8106
Fax: 717-772-4526
kjoel@attorneygeneral.gov**