

FRANKLIN COUNTY BOARD OF ELECTIONS
280 EAST BROAD STREET
COLUMBUS, OHIO 43215
(614) 462-3100

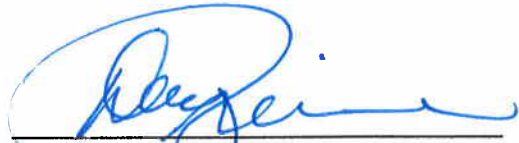
MINUTES OF THE MEETING ON

3-10-11

APPROVED ON

3/24/11

BY:



Douglas J. Preisse, Chairman


Michael F. Colley, Esq


Kimberly E. Marinello


Zachary Manifold

ATTEST:


William A. Anthony, Jr., Director

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BEFORE THE
FRANKLIN COUNTY BOARD OF ELECTIONS

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IN RE: :
Board Meeting :
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Proceedings before Chairman Douglas J.
Preisse, Board Members Michael F. Colley,
Kimberly E. Marinello and Zachary E. Manifold,
Director William A. Anthony, Jr., and Deputy
Director Nathan Burd, taken at the Franklin
County Board of Elections, 280 East Broad
Street, Columbus, Ohio, on Thursday, March 10,
2011, at 2:39 o'clock p.m.

- - - - -

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1 APPEARANCES:
 2 Chester, Willcox & Saxbe, LLP
 3 65 East State Street
 4 Columbus, Ohio 43215
 5 By Mr. Donald C. Brey,
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 7 On behalf of James P. O'Grady.
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11 ALSO PRESENT:
 12 Ms. Suzanne Brown
 13 Administrative Assistant
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1 -----
 2 PROCEEDINGS
 3 -----
 4 MR. ANTHONY: I'd like to call the
 5 Board of Elections meeting to order, and we'll
 6 do the roll call. Kimberly Marinello.
 7 MS. MARINELLO: Here.
 8 MR. ANTHONY: Zach Manifold.
 9 MR. MANIFOLD: Here.
 10 MR. ANTHONY: Doug Preisse.
 11 CHAIRMAN PREISSE: Here.
 12 MR. ANTHONY: Michael Colley.
 13 MR. COLLEY: Here.
 14 MR. ANTHONY: Everyone is here. Mr.
 15 Chairman, the first item of business would be
 16 approval of the minutes for several meetings
 17 that we've had already.
 18 MS. MARINELLO: Mr. Chairman, I move
 19 that the minutes of the meetings of the Board
 20 held on February 7th, February 14th and
 21 February 24th be approved as submitted.
 22 MR. ANTHONY: Is there a second to
 23 that?
 24 MR. MANIFOLD: I'll second it.

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1 CHAIRMAN PREISSE: We have a second.
 2 MR. ANTHONY: All those in favor,
 3 say aye.
 4 MEMBERS: Aye.
 5 MR. ANTHONY: So moved. At this
 6 point, Mr. Chair, there is a protest hearing
 7 regarding the municipal court candidacy of
 8 John P. O'Grady, and I'll let you take over
 9 the proceedings, sir.
 10 -----
 11 CHAIRMAN PREISSE: Okay. We are,
 12 among other reasons on the agenda, gathered
 13 today for the purpose of a protest which has
 14 been launched against the candidacy of James
 15 P. O'Grady, and I think we will proceed by
 16 asking the protestors to address the Board.
 17 Good afternoon.
 18 MR. MCTIGUE: Good afternoon, Mr.
 19 Chair, members of the Board of Elections. I'm
 20 Donald McTigue on behalf of the protestor,
 21 Mr. Crosby, Robert W. Crosby.
 22 The issue in this case is very
 23 straightforward. The Board is aware that in
 24 order to be a candidate for any judicial

<p style="text-align: right;">Page 6</p> <p>1 office, the candidate must have six years of 2 experience or practice of law preceding when 3 the term begins. 4 We filed this protest, Mr. Crosby 5 filed this protest on the basis that he 6 believed that the candidate, Mr. O'Grady, does 7 not have six years, that he was short of that 8 by several months. So we hope to show today 9 that indeed that he is short of that six-year 10 requirement. 11 He was admitted to the Ohio bar on 12 May 21st of 2005, which is more than six years 13 prior to the term commencing. However, the 14 requirement is not one for being admitted to 15 the bar; the requirement is one for being 16 engaged in the actual practice of law. 17 The period that we're talking about 18 here, just to kind of focus on this, is during 19 a period in which he was employed as a bailiff 20 in the municipal court. In July of '07, he 21 became employed as an assistant prosecuting 22 attorney in the Franklin County Prosecuting 23 Attorney's office. 24 However, taking that time period</p>	<p style="text-align: right;">Page 8</p> <p>1 papers that have been approved, subject to 2 this protest, as a candidate for the municipal 3 court judge for the unexpired term. 4 There are some things we do not 5 disagree about, and so we can get those off 6 the table early on. 7 There is a statute, 1901.'06 of the 8 Revised Code, that requires a municipal judge 9 to have been admitted to practice of law in 10 this state for a total of -- and to have been 11 for a total of six years preceding the 12 appointment of the commencement of the judge's 13 term engaged in the practice of law in this 14 state. 15 And we agree with Mr. McTigue that 16 he both has to have his license for six years, 17 which he has, and that he has to have been 18 engaged in the practice of law for six years, 19 which we contend that he also has, but that's 20 the matter of dispute. 21 We also don't dispute the dates of 22 his service. We both agree that from July of 23 2007 for the four years, and it will be four 24 years, I guess, four months come November, or</p>
<p style="text-align: right;">Page 7</p> <p>1 from July of '05 to the beginning when this 2 term will begin would be less than the six 3 years. Clearly, we can see that his work as 4 assistant prosecutor is engaged in the 5 practice of law, so we're only focused on the 6 time period before he went to the prosecutor's 7 office when he was still employed as a bailiff 8 in the muni court. 9 I think as well, the term of office, 10 this is an election for an unexpired term, so 11 I think the time period that we're talking 12 about here probably is the term begins, we 13 calculate the earliest possible time would be 14 November 19, 2011. That would be the first 15 day that this Board of Elections could certify 16 the official results of the election, and that 17 since it's an unexpired term, whoever the 18 winner is of that election could take office. 19 That closes my opening statement. 20 Mr. Brey may have one. 21 MR. BREY: Mr. Chairman, members of 22 the Franklin County Board of Elections, my 23 name is Donald Brey, and I represent the 24 candidate, James P. O'Grady, who has filed his</p>	<p style="text-align: right;">Page 9</p> <p>1 five years, five months in December, whenever 2 his term actually begins, but he's been 3 involved with the practice of law certainly as 4 an assistant county prosecutor. 5 We also don't agree that -- excuse 6 me, also do agree as set forth in the brief of 7 Mr. McTigue that the required duties of 8 bailiff do not require you to practice law, 9 and in fact, for many years, Mr. O'Grady was a 10 bailiff and did not practice law. But a rose 11 by any other name would smell as sweet. The 12 issue is not what title did he hold, but was 13 he in fact practicing law, whatever title he 14 held. 15 And in fact, the evidence will show 16 that after he obtained his admission to the 17 bar in May of 2005, he immediately became 18 someone who was, in addition to his bailiff 19 duties, practicing law as a de facto staff 20 attorney. 21 I realize that not every member of 22 this board is a practicing lawyer and may not 23 be aware, but a staff attorney is the title of 24 someone who assists the judge in drafting</p>

<p style="text-align: right;">Page 10</p> <p>1 opinions, you know, managing case dockets in 2 some ways but also in terms of reviewing 3 motions, advising the judge on legal issues as 4 requested, doing research, sometimes they 5 handle settlement conferences, the sorts of 6 things that are in fact practice of law and 7 everybody acknowledges to be practice of law 8 by someone who both has the title of staff 9 attorney in the common pleas court and in the 10 court of appeals and performs those duties. 11 In municipal court, there is no job 12 with that title, and therefore, in Mr. 13 O'Grady's case, and frankly in some other 14 cases of individual bailiffs who are admitted 15 to the bar, judges elect to have them perform 16 the duties of a staff attorney in addition to 17 the duties of bailiff. 18 And we will have evidence to say 19 that that's exactly what happened in the case 20 of Mr. O'Grady from May of 2005 until he left 21 the employ of the municipal court and became 22 an assistant prosecuting attorney of Franklin 23 County. 24 There is also some case citations</p>	<p style="text-align: right;">Page 12</p> <p>1 Revised Code 1901.06, the very statute that 2 we're dealing with today. 3 And the Court went on to say that 4 the purpose of that statute, of having six 5 years' experience, was not to place an 6 arbitrary and technical barrier against a 7 person who might possess in reality the 8 knowledge, training, experience and soundness 9 of judgment that would qualify him or her to 10 fill the office of judge. 11 And it imposed upon boards of 12 election, including this one, the duty to 13 construe the words in that statute in a 14 liberal fashion. They said, quote: Words 15 limiting the right of a person to hold office 16 are to be given a liberal construction in 17 favor of those seeking to hold office in order 18 that the public may have the benefit of choice 19 from all those who are in fact and in law 20 qualified. 21 And thus, in that case, they 22 reversed a 1955 Ohio Supreme Court decision 23 that went the other way. The 1955 case 24 actually would have supported Mr. McTigue's</p>
<p style="text-align: right;">Page 11</p> <p>1 attached to the brief of Mr. McTigue which 2 talk about issues dealing with the 3 unauthorized practice of law and suggest, I 4 believe inaccurately, that that is in fact the 5 standard that we'd look at. 6 But we have attached to our brief, 7 the key citation is Schenk v. Shattock, a 1982 8 Ohio Supreme Court case which dealt with this 9 very statute, an earlier version of this very 10 statute. That version required the six years 11 of practice of law to be your primary duties. 12 The current statute doesn't require it to be 13 primary; it just requires that you be involved 14 in the practice of law. 15 But the Schenk case, which is 16 attached as Exhibit 1 to our brief, indicated 17 that, and I quote: The words "practice of 18 law" may have an entirely different meaning in 19 a statute designed to prevent the practice of 20 law by one not qualified to do so from that 21 which the same expression should have in 22 determining qualification to hold judicial 23 office. 24 And again, they were interpreting</p>	<p style="text-align: right;">Page 13</p> <p>1 argument, but the Ohio Supreme Court reversed 2 that, and its reversal is to this day the law 3 of the land. It's been upheld. I believe 4 there's an advisory opinion that members of 5 the Franklin County Board of Elections 6 received. It's also attached as Exhibit 2 to 7 our complaint, which talks about the duty to 8 interpret the phrase "engaged in the practice 9 of law" in a liberal fashion. 10 And there are also Ohio Supreme 11 Court cases talking about -- when we think of 12 practice of law, commonly, most people think 13 you're representing a client in court, you're 14 suing somebody, but that's not all there is, 15 and the Ohio Supreme Court has said that. 16 The Ohio Supreme Court has 17 explicitly said, in the case we attached as 18 Exhibit 3 to our exhibit, that attorney-client 19 privilege, for example, also applies to the 20 legal representation of state agencies and 21 officers in courts and tribunals, but in 22 addition, to legal advice given by in-house 23 counsel to folks who are officers or employees 24 of the state.</p>

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1 So just because you're not
2 representing somebody as a client in court
3 doesn't mean you're not practicing law.
4 Which, by the way, was also true in the Schenk
5 case. They dealt with a referee who didn't
6 represent clients in court.
7 Now, it is true that many of the
8 duties, even after Mr. O'Grady passed the bar,
9 were not duties that a lawyer had to do.
10 We're not saying that everything he did was
11 involving the practice of law. What we are
12 saying is that he was involved in the practice
13 of law on at least a part-time basis as part
14 of his duties as a bailiff from the time he
15 became a member of the bar.
16 And again, you don't have to take my
17 word for it. The part-time practice of law is
18 enough, because once again, the Ohio Supreme
19 Court, construing the very statute we're
20 looking at today, said in the case we attached
21 as Exhibit 4, a 1994 case, Kelly vs. Cuyahoga
22 County Board of Elections, that someone who
23 thinks you can keep somebody from running for
24 judge just because they practice part time is

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1 wrong, that there's nothing in the statute, in
2 Revised Code 1901.06, that says it has to be
3 your full-time job or the only thing you do in
4 your job.
5 And it basically -- the Ohio Supreme
6 Court required the Board of Elections to put
7 back on the ballot -- I believe that's the
8 case; I may be wrong about who was suing who,
9 but the decision said that the person should
10 be on the ballot even though they they'd only
11 practiced part time rather than full time.
12 So again, we will have evidence in
13 front of you. And by the way, the burden is
14 not ours. The burden is the protestors'. If
15 we presented no evidence and they presented no
16 evidence, obviously, you know, you have to
17 keep the person on the ballot because the rule
18 is, you can't throw somebody off unless a
19 protest is proven.
20 So we don't have that burden, but
21 nonetheless, we will present evidence, or
22 anticipate presenting evidence showing that in
23 fact what Mr. O'Grady did during all the time
24 he was both a member of the bar and a bailiff

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1 included the practice of law as a de facto
2 staff attorney. Thank you.
3 CHAIRMAN PREISSE: Mr. McTigue.
4 MR. MCTIGUE: Okay?
5 CHAIRMAN PREISSE: Yes, okay.
6 MR. MCTIGUE: Mr. Chair, before I
7 call our first witness, we do have a
8 stipulation, Mr. Brey and myself, that Mr.
9 Crosby is a qualified elector of the judicial
10 district, the Franklin County Municipal Court,
11 which is a requirement to be eligible to file
12 the protest.
13 MR. BREY: I agree with that. I
14 accept his representation, plus it's right.
15 MR. MCTIGUE: I would like to call
16 Mr. O'Grady. Where do you want the -- you
17 just want to have him stand here, or sit?
18 MR. BREY: We could put a chair up
19 somewhere. That would be more convenient.
20 CHAIRMAN PREISSE: What's most
21 comfortable and agreeable to you two is fine
22 with us, I think.
23 MR. MCTIGUE: Mr. O'Grady reminded
24 me that he was a former student of mine, but

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1 I'm not going to go any easier on him as a
2 result.
3 CHAIRMAN PREISSE: Then he must be
4 well-schooled.
5 -----
6 CROSS-EXAMINATION
7 BY MR. MCTIGUE:
8 Q. Could you state your name for the
9 record, please.
10 A. James P. O'Grady.
11 Q. And, Mr. O'Grady, I just want to ask
12 you a couple quick questions just to kind of
13 nail down a date here.
14 Oh, I'm sorry, he has to be sworn
15 in.
16 CHAIRMAN PREISSE: Okay.
17 -----
18 JAMES P. O'GRADY
19 being first duly sworn, testifies
20 and says as follows:
21 -----
22 Q. Your name hasn't changed in the
23 meantime, right?
24 A. It has not.

<p style="text-align: right;">Page 18</p> <p>1 Q. Okay, very good. What day did you 2 actually start at the prosecutor's office, do 3 you remember, in July of '07? 4 A. I don't remember the exact day. I 5 know it was in late July, the 25th, somewhere 6 in the 20s. 7 Q. Okay. And did you go straight from 8 your position as a bailiff to the prosecutor's 9 office? 10 A. Yes. 11 Q. Now, you were admitted to the Ohio 12 bar on May 21st of '05, correct? 13 A. Yes. 14 Q. Okay. And you continued to work in 15 the prosecutor's -- I'm sorry, in the 16 municipal court as a bailiff until July, 17 sometime in July of '07, correct? 18 A. Yes. 19 Q. Okay. And was that your only 20 employment during that time period? 21 A. Yes. 22 Q. Okay. And can you describe for me 23 during that time period what your duties were 24 as a bailiff?</p>	<p style="text-align: right;">Page 20</p> <p>1 represented and parties who were 2 unrepresented. 3 Q. So that last group was things that 4 you did after you were admitted to the bar? 5 A. Yes. 6 Q. And those were in addition to the 7 other duties; you continued to do the other 8 duties, as well? 9 A. Yes. 10 Q. Let me go through some of the things 11 that you just mentioned, the new duties or 12 additional duties that you took on after being 13 admitted to the bar. You mentioned pulling 14 all civil files and reviewing all motions in 15 civil cases. So you didn't pull civil files 16 when you were -- before you were admitted to 17 the bar? 18 A. I did not pull civil files and 19 review motions and do research on the motions 20 and generate opinions for the judge prior to 21 my admission to the bar. 22 Q. Okay. The reviewing the motions and 23 doing research on the motions, is that 24 something that is done by any other employees</p>
<p style="text-align: right;">Page 19</p> <p>1 A. After I was admitted to the bar? 2 Q. Yeah, after you were admitted to the 3 bar. 4 A. Do you want the duties that were 5 only -- well, my duties were to be a bailiff 6 to Judge VanDerKarr, which those duties would 7 have included scheduling cases, pulling 8 dockets; being an intermediary between the 9 public and the judge, the lawyers and the 10 judge; coordinating with the sheriff's 11 department, transport of prisoners; 12 coordinating with the probation department, 13 individuals who were placed on probation, 14 making sure they were taken into the probation 15 department. 16 Then additionally, they would have 17 included -- after my admission to the bar in 18 2005, they included the pulling of the civil 19 motions, reviewing civil motions, conducting 20 any legal research necessary on civil motions, 21 drafting decisions for the judge, drafting 22 opinions on the motions for the judge, 23 conducting mediation/settlement conferences 24 with both parties in civil cases who were</p>	<p style="text-align: right;">Page 21</p> <p>1 of the municipal court in Franklin County? 2 A. Pulling civil motions and reviewing 3 the motions, well, the judges do that. The 4 magistrates do that on their cases. There are 5 other bailiffs who are lawyers who did that 6 for their judges, as well. 7 Q. Are there any staff attorneys 8 available in muni court to the judges? 9 A. No. 10 Q. Now, as I understand it, what you're 11 saying is that these new duties that you took 12 on after being admitted to the bar were in 13 your capacity as a bailiff but constitute the 14 practice of law; is that your position? 15 A. No. My position is they were in my 16 capacity as a lawyer. 17 Q. But you weren't employed as a 18 lawyer, correct? 19 A. I was employed as the judge's 20 bailiff, which constituted doing job duties 21 that the judge instructed me to do. 22 Q. Okay. But you were being paid to do 23 those duties? 24 A. I was being paid to be his employee,</p>

<p style="text-align: right;">Page 22</p> <p>1 to be his bailiff.</p> <p>2 Q. To be his bailiff, but at the same</p> <p>3 time, you're saying that those additional</p> <p>4 duties were not within the scope of your</p> <p>5 position as a bailiff?</p> <p>6 A. My position as a bailiff changed</p> <p>7 somewhat once I was admitted to the bar.</p> <p>8 Q. Did it change by operation of just</p> <p>9 the duties that you were being given by the</p> <p>10 judge, or did it change by operation of some</p> <p>11 law or rule?</p> <p>12 A. By the duties being given to me by</p> <p>13 the judge.</p> <p>14 Q. So I'm a little confused now. Are</p> <p>15 you saying that these additional duties were</p> <p>16 in your capacity as a bailiff or not in your</p> <p>17 capacity as a bailiff?</p> <p>18 A. They were in my capacity as his</p> <p>19 employee, as a bailiff, and at that point as a</p> <p>20 licensed attorney.</p> <p>21 Q. Okay. The pulling of civil files,</p> <p>22 the reviewing of motions and doing research</p> <p>23 related to those motions, a person doesn't</p> <p>24 have to be an attorney to do that, to be able</p>	<p style="text-align: right;">Page 24</p> <p>1 that he took on, if that is something that can</p> <p>2 also be done by someone such as a law student</p> <p>3 who doesn't necessarily have a law degree.</p> <p>4 And I think it's a fair question, because he</p> <p>5 is claiming that these duties constitute being</p> <p>6 engaged in the practice of law.</p> <p>7 MR. BREY: I disagree that it's a</p> <p>8 fair question, because we all know that law</p> <p>9 students when they're heavily supervised by</p> <p>10 partners often do the very same things that</p> <p>11 young attorneys do when they're supervised by</p> <p>12 partners, but when the attorneys do it it's a</p> <p>13 practice of law, even though some do not. But</p> <p>14 I don't think he's testified about law</p> <p>15 students at all.</p> <p>16 MR. MCTIGUE: Well, the point is,</p> <p>17 when they're supervised by attorneys, whether</p> <p>18 they're supervised by the attorney or not, the</p> <p>19 law student is not engaged in the practice of</p> <p>20 law, because they can't be.</p> <p>21 CHAIRMAN PREISSE: I wonder if you</p> <p>22 could make progress by rephrasing your</p> <p>23 question.</p> <p>24 Q. Well, let me ask you this: You're</p>
<p style="text-align: right;">Page 23</p> <p>1 to do that, correct?</p> <p>2 A. I would think they do. If you're</p> <p>3 going to do it efficiently and do it</p> <p>4 correctly, I would say yes, they do.</p> <p>5 Q. Well, let's say there was a law</p> <p>6 clerk or a paralegal, couldn't a law clerk or</p> <p>7 paralegal do those things, as well?</p> <p>8 A. What is your definition of a law</p> <p>9 clerk?</p> <p>10 Q. Well, let's say a law student,</p> <p>11 someone who's a law student who's employed by</p> <p>12 a firm or by the prosecutor's office or by the</p> <p>13 court, if they're assigned -- if a law</p> <p>14 student/law clerk, okay, is assigned to review</p> <p>15 a motion, do research regarding the motion,</p> <p>16 they don't have to be an attorney to be able</p> <p>17 to do that, correct?</p> <p>18 MR. BREY: I would object. I think</p> <p>19 that he's asking the witness to speculate.</p> <p>20 It's something that's not really in evidence.</p> <p>21 MR. MCTIGUE: Well, I'm not asking</p> <p>22 him to speculate on something that's not in</p> <p>23 evidence. I'm asking him if in his view what</p> <p>24 he has said is his duty or the additional duty</p>	<p style="text-align: right;">Page 25</p> <p>1 in the prosecutor's office now; does the</p> <p>2 prosecutor's office employ any law students as</p> <p>3 clerks?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. Does the prosecutor's office</p> <p>6 employ paralegals or legal assistants?</p> <p>7 A. Not that I -- I can't answer that; I</p> <p>8 don't know.</p> <p>9 Q. Okay. Then we'll just limit it to</p> <p>10 the law clerks.</p> <p>11 A. Okay.</p> <p>12 Q. Reviewing motions and doing research</p> <p>13 related to those motions, are those one of the</p> <p>14 things that law clerks in the prosecutor's</p> <p>15 office do?</p> <p>16 A. Yes.</p> <p>17 Q. Now, I think you also mentioned, and</p> <p>18 correct me if I'm wrong, but I think you</p> <p>19 mentioned you would convey your research</p> <p>20 findings to Judge VanDerKarr?</p> <p>21 A. Correct.</p> <p>22 Q. And is that something that law</p> <p>23 clerks do, in your experience, as well; after</p> <p>24 they do their research on a motion or just</p>

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<p>1 general research, they convey that to their 2 boss? 3 A. Yes. 4 Q. Okay. You also drafted decisions; 5 is that correct? 6 A. Yes. 7 Q. Decisions on motions? 8 A. Both on motions and I would assist 9 on cases, as well. 10 Q. Okay. The final judgment decisions? 11 A. Right. 12 Q. In terms of the drafting decisions 13 on final judgments, or final judgment 14 decisions, how often did you do that or how 15 many of those, if you recall? 16 A. I couldn't speculate. A large 17 number. I mean, when you look at the civil 18 dockets we had, they're large, so, very many. 19 Q. Now, you also mentioned, I think, 20 conducting settlement conferences on civil 21 cases? 22 A. Correct. 23 Q. How often did you do that? 24 A. Pretty much every time we had civil</p>	<p>1 A. Yes. 2 Q. Okay. And how do you have that 3 knowledge? 4 A. My wife is a staff attorney. 5 Q. She is or was? 6 A. Was. 7 Q. Was, okay. She was a staff attorney 8 for who? 9 A. For Judge Bender and for Judge 10 Sadler. 11 Q. Okay. In terms of the reviewing of 12 motions and doing the research and the writing 13 on those, decisions on motions, how often did 14 that occur? 15 A. Once a week. 16 Q. Once a week? 17 A. Yes. Not that it would be one day, 18 but every week the motions were pulled. So 19 all motions that are filed, I would pull all 20 motions every week. 21 Q. Okay. So you're saying it's not one 22 motion a week. 23 A. Correct. 24 Q. It's one day a week you're pulling</p>
Page 27	Page 29
<p>1 cases set, which would be upwards of -- 2 probably conservative estimate would be 3 somewhere in the neighborhood of seven to nine 4 days a month. 5 Q. What's involved in conducting 6 settlement conferences? 7 A. Reviewing the file, reviewing all 8 pleadings that are filed, and then sitting 9 down with the parties and discussing the case 10 with them, seeing if -- it was settlement and 11 mediation both; seeing if the resolution of a 12 case could be had. 13 Q. So attempting and if it appears that 14 the parties are willing to discuss settlement, 15 you essentially try to mediate a settlement? 16 A. In some instances. 17 Q. You indicated that the Franklin 18 County Muni Court doesn't have any staff 19 attorneys that judges can call upon; is that 20 correct? 21 A. That is. 22 Q. So do you have any direct 23 familiarity with what staff attorneys do in 24 other courts?</p>	<p>1 the motions and doing that? 2 A. If you start at zero and you have a 3 hundred cases pending, I would have pulled all 4 hundred cases, all motions pending on all 5 cases, and then as time would go on, you would 6 pull motions that were filed continually. 7 Q. And you were a bailiff for a 8 considerable period of time; how many years? 9 A. Fifteen. 10 Q. Fifteen. In your experience as a 11 bailiff in the Franklin County Municipal 12 Court, were there other bailiffs who did not 13 have law degrees who also pulled files and 14 reviewed motions? 15 A. No. 16 Q. Do you know of any other bailiffs 17 that do do that? 18 A. That are lawyers or are not lawyers? 19 Q. That are lawyers, let's say. 20 A. Yes. 21 Q. Because you've already answered on 22 the others. 23 A. Yes. 24 Q. Okay. And who would that be?</p>

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<p>1 A. Danielle Sparks, Judge Taylor's 2 bailiff. And I believe Dave Kennedy does it 3 as well, and that's Judge Salerno's bailiff. 4 Q. Okay. Now, you also served as a 5 magistrate for a period of time; is that 6 correct? 7 A. Yes. 8 Q. And that was in addition to being a 9 full-time bailiff, you served part time as a 10 magistrate? 11 A. Yes. 12 Q. What was that time period? 13 A. August of 2005 until early 2006 14 would have been when my final decision was 15 filed in the clerk's office. 16 Q. Early 2006? 17 A. Correct. 18 Q. I'm going to show you what we have 19 marked as Exhibit C attached to the memorandum 20 that we filed. Is that a copy of the oath 21 that you took for your position as magistrate? 22 A. It is. 23 Q. Okay. And then the next page I'll 24 show you is marked as Exhibit D, and it</p>	<p>1 I -- or administrative judge, sorry, when I 2 was a magistrate. 3 My rationale is this: That I was 4 sitting on the bench hearing cases between the 5 dates specified in the letter, but decisions 6 that were written regarding those cases were 7 written by me after October 17th. And what I 8 mean is that October 17th may -- I take the 9 letter to be accurate, but that is the last 10 date that I would have sat on the bench and 11 had a bench trial tried to me, but I did not 12 render a decision from the bench that day; I 13 rendered a decision at a later date. 14 And so I don't think you can say 15 that I was no longer a magistrate as soon as I 16 stepped off the bench on the 17th, because I 17 had not yet filed the decision on the case. 18 So the date I would have filed my last 19 decision would be the date that I would deem 20 to have been the end of my service as a 21 magistrate. 22 Q. Okay. And what date was that? 23 A. I don't recollect the exact date, 24 but I do know that it was in very early</p>
Page 31	Page 33
<p>1 appears to be a letter signed by Judge Green. 2 Have you seen that letter; are you familiar 3 with it? 4 A. Yes. It was written to me. 5 Q. Okay. And it is in fact a letter to 6 you from Judge Green? 7 A. Yes. 8 Q. Okay. And in this letter, Judge 9 Green states that you were a magistrate for 10 two months, till October of 2005? 11 A. Correct. 12 Q. You mentioned that you continued to 13 act as a magistrate till early 2006, so you 14 disagree with that? 15 A. With his letter? Yes. 16 Q. Can you tell me what the basis for 17 your disagreement is with Judge Green? 18 A. Certainly. The letter from Judge 19 Green was requested, I believe the day -- this 20 was May of 2007, so it's -- 21 Q. May 3rd. 22 A. May 3rd of 2007. So it's sometime 23 after my service as a magistrate, and Judge 24 Green was not the administrative bailiff when</p>	<p>1 January of 2006. 2 MR. MCTIGUE: Okay. I have no 3 further questions. 4 CHAIRMAN PREISSE: Thank you. 5 Mr. Brey, I assume you wish to 6 continue the discussion. 7 MR. BREY: If it please the Chairman 8 and the Board. 9 ----- 10 EXAMINATION 11 BY MR. BREY: 12 Q. Is it accurate or inaccurate to say 13 that after you were admitted to the bar in May 14 2005, your title did not change but your 15 duties did? 16 A. That is accurate. 17 Q. As a bailiff, have you ever had 18 occasion to deal with a case involving a 19 lawyer suing for fees? 20 A. As a bailiff? 21 Q. Yes. Or have you ever reviewed a 22 file that had that sort of issue come before 23 you? 24 A. Not to my recollection.</p>

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1 Q. Okay. Do you know whether or not
 2 lawyers charge clients for legal fees based
 3 upon, in private practice, their review of
 4 motions and their research and drafting of
 5 responses to them?
 6 A. Yes.
 7 Q. You know that they do that?
 8 A. Yes.
 9 Q. How do you know they do that?
 10 A. I have friends who are lawyers, and
 11 I know what they do in their business, so I'm
 12 familiar with it.
 13 Q. Do you think those friends would be
 14 surprised to learn that they're not in fact
 15 practicing law and therefore they're not
 16 allowed to charge their clients as if they
 17 are?
 18 MR. MCTIGUE: Objection.
 19 MR. BREY: Question withdrawn. It
 20 was rhetorical.
 21 Q. In addition to conducting settlement
 22 conferences after you pass the bar, did you
 23 also draft entries stating the terms of a
 24 settlement if you were successful in -- if the

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1 mediation was successful in coming up with a
 2 settlement?
 3 A. Yes.
 4 Q. And did you do that on a regular
 5 basis or a sporadic basis, or how often?
 6 A. Regular. I mean more than once a
 7 month.
 8 Q. And I believe you've testified and I
 9 won't recapitulate a lot of the research and
 10 drafting you did on civil topics; did you ever
 11 have occasion to research or draft any
 12 decisions on a criminal topic while you were
 13 an attorney bailiff?
 14 A. Yes. Judge Froelich had me research
 15 an OVI case for him, and additionally he had
 16 me write the decision on the case for him.
 17 Q. And did you ever have occasion to
 18 give Judge VanDerKarr updates on the law to
 19 make sure his decisions and sentences were in
 20 compliance with the evolving nature of the
 21 law?
 22 A. Yes.
 23 Q. And was that something you did once
 24 or twice or more frequently than that?

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1 A. More frequently than that.
 2 Q. How frequently would do you that?
 3 A. I couldn't speculate.
 4 Q. Okay. Since you're married to a
 5 staff attorney for common pleas court, I
 6 understand you have a pretty good knowledge of
 7 what they do, but was your wife doing anything
 8 different as staff attorney than the new
 9 duties you had assumed after you passed the
 10 bar as bailiff?
 11 A. No.
 12 Q. Oh, and by the way, was Judge
 13 VanDerKarr, who's in the courtroom, the judge
 14 for whom you worked as bailiff throughout the
 15 time you were an attorney bailiff?
 16 A. Yes.
 17 Q. Were you engaged in the practice of
 18 law in Ohio from the time you passed the bar
 19 on May 21, 2005, through the present,
 20 continuously?
 21 MR. MCTIGUE: Objection. That's the
 22 ultimately legal decision that has to be made
 23 by the Board.
 24 MR. BREY: It may be the ultimate

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1 legal decision, but the old rule saying he
 2 can't testify to that is no longer the rule of
 3 law.
 4 Q. I'm sorry, was your answer to that
 5 yes?
 6 A. Yes.
 7 MR. BREY: Thank you.
 8 MR. MCTIGUE: I don't have any
 9 further questions. Thank you.
 10 CHAIRMAN PREISSE: Okay.
 11 MR. MCTIGUE: Mr. Chairman, I'd just
 12 like to offer as an exhibit -- two exhibits,
 13 the two that I asked Mr. O'Grady about, which
 14 are Exhibits C and D attached.
 15 MR. BREY: We have no objection.
 16 CHAIRMAN PREISSE: I think those are
 17 the same that have already been distributed to
 18 us, right? So do you want to speak to them?
 19 MR. MCTIGUE: No, I just want to
 20 offer them, make sure there's no objection,
 21 that's all. Mr. Chair, at this time, if I
 22 could have one moment?
 23 CHAIRMAN PREISSE: Sure.
 24 (Pause in proceedings.)

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1 MR. MCTIGUE: We don't have any
 2 further witnesses and would rest.
 3 CHAIRMAN PREISSE: Okay. Mr. Brey.
 4 MR. BREY: We would move for a
 5 directed verdict, but if you want to take that
 6 under advisement, since we will have made the
 7 motion, we do have another witness.
 8 CHAIRMAN PREISSE: Could you repe at
 9 that, please?
 10 MR. BREY: We would like to move for
 11 a directed verdict, because you always do that
 12 when the other side rests, and I think they
 13 haven't made their case.
 14 I think that they had the burden of
 15 proving that Mr. O'Grady had not practiced law
 16 for -- or will not have practiced law for at
 17 least six years by November, December of this
 18 year, whichever it is. And in order to make
 19 their case, they had to prove, in a convincing
 20 way, that Mr. O'Grady while he was an attorney
 21 bailiff was not engaged in the practice of
 22 law. The only evidence, the only evidence in
 23 front of this board is that he was engaged in
 24 the practice of law.

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1 The only argument that I've really
 2 heard about that is, well, you know, some of
 3 these things, research and drafting of motions
 4 and decisions could have been done by a law
 5 clerk under the supervision of a lawyer.
 6 Well, I suppose that's true, but it's also
 7 something that lawyers bill for every day, and
 8 it's undisputed that he characterizes that as
 9 practice of law. It is exactly what his wife
 10 does for as a law clerk for the common pleas
 11 judges, and he knows what she does.
 12 So he's engaged in the practice of
 13 law. There is no testimony, no documentation
 14 that he was not engaged in the practice of
 15 law.
 16 Oh, and by the way, when he talked
 17 about the settlement conferences and the
 18 mediation conferences and drafting entries on
 19 that, Mr. McTigue didn't even ask him any
 20 questions to try to suggest that that wasn't
 21 practice of law, and he does that all the
 22 time, on a fairly regular basis, at least once
 23 a month or so.
 24 And so I don't think the evidence

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1 there -- the evidence before this board is
 2 undisputed, and so I would ask that the Board,
 3 even before we have to put on our case, vote
 4 to reject the protest so we can end this day a
 5 little sooner than we otherwise will.
 6 CHAIRMAN PREISSE: Thank you. I
 7 don't think that the Board is compelled to
 8 vote to reject the protest.
 9 MR. BURD: Well, Mr. O'Grady is
 10 certified to the ballot now, and so I think
 11 our belief would be that the only motion would
 12 be if you wanted to uphold the protest to
 13 remove him from the ballot. I don't know that
 14 we would need to make a motion to do what is
 15 basically already in place, which is keep him
 16 on the ballot, but that's up to you all.
 17 CHAIRMAN PREISSE: Mr. McTigue.
 18 MR. MCTIGUE: Mr. Chairman, since
 19 Mr. Brey has made a motion, I'd like to just
 20 have a short reply to that.
 21 CHAIRMAN PREISSE: I don't think we
 22 recognize it as a motion, because I don't
 23 think he has standing to make a motion, but
 24 you're welcome to speak.

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1 Is he able to make a motion on our
 2 behalf?
 3 MR. BURD: I don't --
 4 CHAIRMAN PREISSE: You can speak.
 5 MR. BREY: If I don't have standing,
 6 we'll go on with the case.
 7 CHAIRMAN PREISSE: Okay. Please
 8 proceed.
 9 MR. MCTIGUE: Just briefly, Mr. Brey
 10 is making his motion in order so he can decide
 11 whether he needs to call a witness, and that's
 12 why he's doing it, so I need to reply to it so
 13 that you have at least the benefit of what I
 14 have to say to that before you make any
 15 decision on that, on the motion, which can be
 16 no decision at this time.
 17 But briefly, Mr. Brey says that all
 18 the evidence is that he practices law, that
 19 it's not disputed. But that's not quite
 20 right. What's not disputed is what he did.
 21 We're not disputing what he testified to in
 22 terms of his extra duties after he passed the
 23 bar. That's fine. It is what it is. Except
 24 the question is, is it the practice of law?

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1 That is the decision that you
 2 ultimately have to make. That's a legal
 3 decision that you have to make about whether
 4 those duties, being done by a bailiff who
 5 happens to have a law degree, if that
 6 constitutes the practice of law. That's going
 7 to be the legal decision that you have to
 8 make. That's what's in dispute.
 9 We're not disputing what he said
 10 about what he actually does. And I think that
 11 that's an important distinction and one that
 12 I'll argue about more in a closing statement,
 13 about how you should go about determining
 14 whether something is the practice of law.
 15 Thank you.
 16 MR. MANIFOLD: Mr. Chairman, if
 17 they'd like to do the other witness, I'm just
 18 -- I mean, they've given us a lot to read, a
 19 lot to go through. I feel like the more
 20 information I have, the better, to make a
 21 decision. That's just how I feel.
 22 MR. BREY: I may have mucked up
 23 things procedurally, which I have a tendency
 24 to do. Why don't I just withdraw the motion

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1 and put Judge VanDerKarr on for brief
 2 testimony, then we'll close our case and the
 3 Board can do what it chooses to do.
 4 CHAIRMAN PREISSE: I don't have any
 5 objection to that if my colleagues don't
 6 either.
 7 -----
 8 SCOTT D. VANDERKARR
 9 being first duly sworn, testifies
 10 and says as follows:
 11 -----
 12 DIRECT EXAMINATION
 13 BY MR. BREY:
 14 Q. Your Honor, would you please state
 15 your name for the record.
 16 A. Scott D. VanDerKarr.
 17 Q. Are you currently a municipal judge
 18 in Franklin County?
 19 A. I am.
 20 Q. And were you the municipal judge to
 21 whom Mr. O'Grady reported?
 22 A. I was, and still am. I mean, he
 23 doesn't work for me anymore, but he did at the
 24 time.

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1 Q. And at the time would at least
 2 include both right before and after his
 3 admission to the bar until he left the
 4 prosecutor's office?
 5 A. That is correct.
 6 Q. Did his duties change after Mr.
 7 O'Grady passed the bar?
 8 A. Yes, they did.
 9 Q. And how did they change?
 10 A. He was able to at that point do
 11 legal research for me, legal research both on
 12 criminal and civil cases, write civil motion
 13 decisions, write civil trial decisions. He
 14 was able to do legal research and fill me in
 15 on the ever-changing law, whether it be
 16 criminal or civil, so I could do my job
 17 better.
 18 I don't see it any different than a
 19 staff attorney for the Ohio Supreme Court. I
 20 know Judge Gary Tyack very well. I know he
 21 has two staff attorneys. I can't imagine that
 22 anybody would argue that his two staff
 23 attorneys aren't practicing law.
 24 Common pleas court judges in

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1 Franklin County have a staff attorney they
 2 provide their judges. So once he was passed
 3 the bar, for the purposes of taxpayers, I
 4 think it would be pretty stupid on my part not
 5 to take advantage of an employee that would be
 6 able to provide the taxpayers of Franklin
 7 County more services for their dollar.
 8 And there are two other judges on my
 9 floor that do that at the present time,
 10 including myself. At one time it would have
 11 been all four of us; when Judge Froelich was
 12 on the floor, when Judge Salerno on the floor,
 13 it would have been all four judges on our
 14 floor did the exact same thing.
 15 Q. And they did it with attorney
 16 bailiffs?
 17 A. They did it with Dave Kennedy, who
 18 was a licensed practice lawyer. They did it
 19 with Danielle Sparks, who was a licensed
 20 lawyer, and we still do it with Danielle.
 21 Danielle Sparks does it on my floor for Judge
 22 Pollitt, Judge Taylor and myself, often.
 23 Q. And did Mr. O'Grady also conduct
 24 settlement conferences on civil cases and

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1 draft the entries when there was a settlement
 2 reached?
 3 A. On a weekly basis. I had Judge
 4 Serrott walk up to me last week and say, you
 5 know, he did mediations while I was doing
 6 civil cases. This isn't rocket science. In
 7 plain language, he's practicing law. I mean,
 8 it's pretty clear.
 9 Q. And in plain language was he
 10 practicing law throughout the time he was an
 11 attorney bailiff for you?
 12 MR. MCTIGUE: I would object --
 13 A. My answer is yes.
 14 MR. MCTIGUE: -- conclusion.
 15 MR. BREY: Well, he already
 16 testified that he was practicing law. I'm
 17 just trying to get the period of time during
 18 which he was practicing law, which is a
 19 factual issue.
 20 THE WITNESS: May I answer the
 21 question, Mr. Chairman?
 22 CHAIRMAN PREISSE: Yes, go ahead.
 23 A. Absolutely.
 24 MR. BREY: I have nothing further at

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1 this time.
 2 -----
 3 CROSS-EXAMINATION
 4 BY MR. MCTIGUE:
 5 Q. Your Honor, these additional duties
 6 that Mr. O'Grady -- that you gave to Mr.
 7 O'Grady, were those duties that he was
 8 performing in his capacity as a bailiff?
 9 A. They were performed in the capacity
 10 as my employee. And as I said on direct
 11 examination, I think if I am given one and a
 12 half employees, a bailiff and a half a
 13 secretary, and I think I am allowed to use
 14 that employee to the best benefit of the
 15 taxpayers of Franklin County, and once he
 16 passed the bar, I probably used him more as a
 17 staff attorney than I did as what the common
 18 language would be as a bailiff.
 19 Q. But he was never employed as a staff
 20 attorney; is that correct?
 21 A. Was he ever given that title? No.
 22 He was given the title of magistrate. I don't
 23 think anybody would ever question that a
 24 magistrate is practicing law.

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1 Q. That's correct, but I'm not talking
 2 about what he did as a magistrate. What I'm
 3 talking about are these additional duties in
 4 terms of reviewing motions and doing research
 5 and writing.
 6 A. To me, that's practicing law, and
 7 what the title is I don't think really
 8 matters. Just like I said with Gary Tyack
 9 coming in here, let's call him in, put him on
 10 the stand and see if he would say his two
 11 staff were practicing law. They're doing the
 12 same duties that Jim O'Grady did for me, so
 13 there wouldn't be any difference between the
 14 two. Supreme Court would be the same.
 15 Q. I understand that, but you really
 16 haven't answered my question, which is --
 17 A. I think I have, but go ahead and ask
 18 it again.
 19 Q. Was he ever employed as a staff
 20 attorney?
 21 A. In my opinion, yes.
 22 Q. Based on the duties that you had him
 23 performing?
 24 A. That is correct.

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1 Q. But that wasn't his title?
 2 A. Didn't officially change his title,
 3 no, I didn't. Danielle Sparks' title hasn't
 4 been changed either, but she's still doing it
 5 today.
 6 Q. Now, the duties of bailiffs, aren't
 7 those prescribed by statute and by court rule?
 8 A. To be honest, I would have to look.
 9 But I still feel like, as an employee for the
 10 City of Columbus, Franklin County Municipal
 11 Court, I am -- he is my immediate employee and
 12 I am doing the taxpayers a favor by providing
 13 services to the taxpayers, and what he was
 14 able to provide to the taxpayers was the
 15 practice of law.
 16 Q. Does the Franklin County Muni Court
 17 have any staff -- any persons employed as
 18 staff attorneys?
 19 A. No.
 20 Q. So there's not a staff attorney that
 21 is shared by the judges?
 22 A. No.
 23 MR. MCTIGUE: I don't have any
 24 further questions. Thank you.

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1 MR. BREY: I have nothing further.
 2 CHAIRMAN PREISSE: Okay, thank you.
 3 Any board members have any comments
 4 or questions to make at this time? Or where
 5 are we at this point in the proceedings? Do
 6 we ask our opposing sides to wrap up or to
 7 make a final statement? What's the pleasure
 8 of the Board or the tradition here?
 9 MR. MANIFOLD: I had a question for
 10 Mr. McTigue.
 11 In your opinion, if he did pick up
 12 all these additional duties after he became a
 13 licensed attorney, do you think that that
 14 meets the requirement, the six-year
 15 requirement?
 16 MR. MCTIGUE: No. Our view is that
 17 it's not the practice of law. He was employed
 18 as a bailiff, and we've attached to our
 19 hearing memorandum what the duties of bailiffs
 20 are that are prescribed both under state
 21 statute and under the rules of the Franklin
 22 County Municipal Court.
 23 Now, he was never employed as a
 24 staff attorney. These additional duties that

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1 he was given are duties that do not
 2 necessarily have to be performed by an
 3 attorney. They can be performed by a
 4 paralegal or a law clerk. You don't have to
 5 be an attorney to do these additional things
 6 that were given to him to do.
 7 It requires, perhaps, to do legal
 8 research and some legal writing. It perhaps
 9 takes some legal training, but you don't have
 10 to be a lawyer to do that. You could do it,
 11 as I said, if you're a law student, you have
 12 some training; if you're a paralegal you can
 13 have some training. These are what they do.
 14 But are they practicing law? No. They're not
 15 practicing law.
 16 They are not engaged in the practice
 17 of law, so simply doing those things doesn't
 18 mean that he was engaged in the practice of
 19 law.
 20 The additional time that he served
 21 as magistrate does count towards his six
 22 years, but, you know, even taking the time
 23 that he mentioned, the time beyond when he no
 24 longer sat as a magistrate but continued to

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1 work on finishing up some decisions, that adds
 2 about five months to his time as an assistant
 3 prosecutor -- you take those five months, add
 4 them to his time as assistant prosecuting
 5 attorney, and he's still short of his six
 6 years.
 7 So he needs, and why most of the
 8 testimony has obviously focused on this, he
 9 needs some additional time being engaged in
 10 the practice of law. And we believe that it
 11 doesn't fit the requirement of the statute.
 12 Thank you.
 13 CHAIRMAN PREISSE: All right.
 14 MR. MANIFOLD: I have one more.
 15 CHAIRMAN PREISSE: Go ahead.
 16 MR. MANIFOLD: Give me a second; let
 17 me find it.
 18 Well, I can't.
 19 CHAIRMAN PREISSE: Well, let me ask
 20 you a question then while you're looking,
 21 which is, aren't there examples out there in
 22 the wide world and didn't we hear a few, I
 23 think, articulated by Mr. Brey and referenced
 24 by Mr. O'Grady, of activities that a nonlawyer

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1 can engage in at some level which aren't the
 2 practice of law but that when a lawyer does
 3 and perhaps is recognized and compensated for
 4 same is the practice of law?
 5 MR. MCTIGUE: I think that that is
 6 an accurate statement, yes. But by the same
 7 token, he wasn't employed as an attorney,
 8 staff attorney or otherwise. He was not
 9 employed in any position that required him to
 10 be an attorney, so I think that that's where
 11 that breaks down.
 12 CHAIRMAN PREISSE: You say he wasn't
 13 employed as an attorney, but I wonder if you
 14 would agree that he was an attorney who was
 15 employed?
 16 MR. MCTIGUE: Yes, he was an
 17 attorney who was employed, but he wasn't
 18 employed as the attorney. Yes, exactly. He
 19 happened to be an attorney, yes.
 20 MR. MANIFOLD: Mr. McTigue, how do
 21 you see -- because I think it's pretty clear
 22 that under the Fwen (ph.) case, this wouldn't
 23 have qualified as far as time. But then the
 24 Schenk case, how do you see the Schenk case

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1 affecting this claim that the additional
 2 duties would meet a liberal -- I like that
 3 word, liberal -- interpretation or rule
 4 towards the requirement?
 5 MR. MCTIGUE: Okay, you're talking
 6 about the Schenk case?
 7 MR. MANIFOLD: Yes.
 8 MR. MCTIGUE: Well, as I said, our
 9 position is that these additional duties that
 10 he spoke of, our view is he wasn't -- he may
 11 have been given those additional tasks to do,
 12 but he was employed as a bailiff. The duties
 13 of a bailiff are set out in statute and in the
 14 court rules.
 15 And as I also said, these additional
 16 duties are ones that aren't ones that have to
 17 be performed by somebody who's been admitted
 18 to the bar, and I think that that's how we
 19 distinguish that.
 20 MR. MANIFOLD: I think I only have
 21 one more question, but it would be to Judge
 22 VanDerKarr.
 23 Have you seen this list of duties
 24 that were before and after admission? Were

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1 any of those duties, did he do any of those
 2 duties prior to admission?
 3 JUDGE VANDERKARR: Pull the civil
 4 files, in a physical sense, yes, he would do
 5 that before and after. But actually pull the
 6 file, open it up, read it and then write a
 7 decision for me and then I say, yes, that's
 8 okay, no.
 9 MR. MANIFOLD: And are there any
 10 other bailiffs that perform those duties that
 11 aren't --
 12 JUDGE VANDERKARR: That aren't
 13 attorneys? No. That would be the
 14 unauthorized practice of law.
 15 MR. MANIFOLD: Of any of those, of
 16 any of those duties?
 17 JUDGE VANDERKARR: Of everything
 18 that is checked off and you were giving legal
 19 advice to a judge, you'd be doing the
 20 unauthorized practice of law. The snake bites
 21 one way or the other.
 22 I know maybe at times I might have
 23 been contrite, but I guess to me -- and it's
 24 not my job to make this decision, it's

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1 yours -- it's clear. I mean, as a magistrate,
 2 the whole reason for that letter that was
 3 testified about was that when he left my
 4 employment, he wanted to stop reporting to the
 5 Supreme Court his financial disclosure forms
 6 with the Supreme Court, and that's when Judge
 7 Green wrote that letter two years later with
 8 less information than Mr. O'Grady and I have
 9 have sitting here.
 10 I disagree with that letter. The
 11 Supreme Court had him doing financial
 12 disclosures right up to the time before he
 13 left.
 14 MR. MANIFOLD: Thank you. And
 15 thanks for coming down. I know you have a
 16 very busy court.
 17 JUDGE VANDERKARR: Well, I'm the
 18 duty judge this week, so actually you gave me
 19 a break from doing a bunch of search warrants
 20 and stuff like that. They'll get me tonight,
 21 instead, at one or two in the morning. And
 22 I've got to apologize, I turned my cell phone
 23 off but my pager -- I can't change it or it
 24 will make noise anyway.

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1 Do you have any questions in regard
 2 to the letter that the Board was asking? I
 3 want to be fair.
 4 MR. MCTIGUE: No. That's nice, but
 5 no, I don't.
 6 JUDGE VANDERKARR: Any other board
 7 members want to ask me any questions while I'm
 8 up? Because I know it's my job to be fair,
 9 it's my job down at the courthouse, but it's
 10 my job as a witness to give you the full
 11 information, and I swore to tell the truth,
 12 the whole truth, nothing but the truth, and I
 13 want to answer your questions if you have any.
 14 CHAIRMAN PREISSE: So the nuance of
 15 the backdating of the date of the letter that
 16 Judge Green supplied was an attempt by Mr.
 17 O'Grady to put a much more recent cap on the
 18 recognition or consideration of him serving as
 19 magistrate.
 20 JUDGE VANDERKARR: When you are a
 21 judge or a magistrate, you have to file a
 22 financial disclosure, which I haven't done
 23 yet, so it's in my briefcase. It's due, I
 24 think, the same day taxes are. And they

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1 require magistrates to do that.
 2 And it was my understanding that Mr.
 3 O'Grady had to do that all the way up to when
 4 he was leaving my employment, all the way
 5 through. From the time Mr. McTigue -- I don't
 6 have my -- I wrote it down, whenever he
 7 elicited the testimony from Mr. O'Grady that
 8 started in August of 2005 all the way up to
 9 the time that he left, he was still doing that
 10 financial disclosure.
 11 I don't know how the Supreme Court,
 12 if they're asking for that from you, isn't
 13 considering that you are there and available
 14 to be a magistrate, in answer to your
 15 question.
 16 I know that's different than the
 17 things that he was doing directly just for me,
 18 because that magistrate work was for all 15
 19 judges, whereas the other, what I consider
 20 staff attorney duties, were for me, Judge
 21 Froelich, and I'm not aware of any others.
 22 Whereas in Danielle Sparks' circumstances, I'm
 23 aware she does it right now, and she's done it
 24 for me, Judge Taylor, Judge Pollitt; I don't

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1 know about Judge Herbert on our floor since
 2 he's fairly new to our floor.
 3 CHAIRMAN PREISSE: All right. Thank
 4 you.
 5 MR. MANIFOLD: Can I have that back?
 6 CHAIRMAN PREISSE: He wants his
 7 documents back, Judge.
 8 JUDGE VANDERKARR: Oh. No, you
 9 can't have them. I'm not used to being a
 10 witness.
 11 CHAIRMAN PREISSE: All right. Now
 12 where are we?
 13 MR. ANTHONY: They need to do their
 14 closing.
 15 CHAIRMAN PREISSE: I beg your
 16 pardon?
 17 MR. ANTHONY: All these things have
 18 a closing.
 19 CHAIRMAN PREISSE: Okay.
 20 MR. BREY: I believe we're at the
 21 closing argument stage. I don't know if
 22 you've given yours yet?
 23 MR. MCTIGUE: Yeah, I gave mine, and
 24 then someone wanted to ask the judge some

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1 follow-up questions.
 2 CHAIRMAN PREISSE: That's right.
 3 JUDGE VANDERKARR: I talk too much.
 4 MR. BREY: Mr. Chairman, Board
 5 members. Protestors claim that
 6 notwithstanding the sworn testimony of Mr.
 7 O'Grady and of Judge VanDerKarr, that Mr.
 8 O'Grady was engaged in the practice of law as
 9 an attorney bailiff. Mr. McTigue argues that
 10 he was not.
 11 Mr. McTigue's client had the duty of
 12 fulfilling the burden of evidence. There is
 13 no sworn testimony other than the sworn
 14 testimony that as an attorney bailiff, Mr.
 15 O'Grady was engaged in the practice of law.
 16 There's argument, but argument is not
 17 evidence. And evidence is what the protestor
 18 has the duty of presenting in order to uphold
 19 the protest. They did not do that.
 20 Now, it is true that there are some
 21 statutes and regulations that require bailiffs
 22 to do certain things, and some of those are
 23 attached to the brief that Mr. McTigue has
 24 filed on behalf of the protestor. But none of

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1 those statutes prohibit a bailiff from doing
 2 other things. There is no statute and there's
 3 certainly no testimony to suggest that a
 4 bailiff who is an attorney is prohibited by
 5 law or anything else from being assigned
 6 duties that constitute engaging in the
 7 practice of law.
 8 The argument that you can have the
 9 title bailiff without engaging in the practice
 10 of law, we agree with. We've never disputed
 11 the fact that many people who are not lawyers
 12 who are bailiffs aren't going to be engaging
 13 in the practice of law, unless they want to
 14 engage in the unauthorized practice of law,
 15 which could get them into a lot of trouble.
 16 Indeed, Judge VanDerKarr pointed out
 17 that the very reason that he and other judges
 18 use attorney bailiffs for the sorts of things
 19 that a staff attorney does and do not use
 20 nonattorney bailiffs for those things is to
 21 prevent the unauthorized practice of law. It
 22 would be wrong.
 23 Now, Mr. McTigue has noted that
 24 there are some things, research and drafting,

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<p>1 that under some circumstances a nonlawyer 2 could do, but he's also acknowledged that when 3 a lawyer does it, generally, at least in 4 private practice and in government practice as 5 a staff attorney, that is being engaged in the 6 practice of law. 7 And by the way, that's what the 8 statute says. It says engaged in the practice 9 of law. It doesn't say have a title that 10 requires you to do practice of law. It talks 11 about, are you doing it. Not do you have the 12 right title. There is nothing in the law and 13 no evidence presented that suggests that you 14 have to have a certain title before you can be 15 engaged in the practice of law. 16 As a matter of fact, one of the 17 cases that we have attached to our brief, the 18 last one, the Kelly versus Cuyahoga Board of 19 Elections case in 1994, dealt with someone who 20 held a full-time job that didn't require or, 21 in her case, she didn't even engage in the 22 practice of law in her full-time job as 23 someone who was working for the county 24 probation department.</p>	<p>1 There is no testimony by anyone that 2 a law clerk could ever do that, and that's 3 what Mr. O'Grady was doing, among his other 4 duties. He was doing something that there is 5 no dispute about the fact that only a lawyer 6 could do, not even a law clerk could do, even 7 a law clerk who would be doing the same thing 8 as an associate or a young lawyer, and, of 9 course, when the lawyer does it, it's the 10 practice of law. 11 So we have a situation where the 12 testimony is pretty much undisputed. Mr. 13 McTigue said it's up to you to decide whether 14 or not what he actually did was the practice 15 of law. But we have testimony from people who 16 know what the practice of law is, and they 17 said that it is. 18 He could have gotten an expert. He 19 could have had somebody else look at this 20 activity or give an opinion as an expert 21 saying that this is not the practice of law 22 and create something for you to decide between 23 two witnesses. But he didn't do that. 24 There's nobody other than people who say what</p>
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<p>1 However, that woman actually engaged 2 in some practice of law, some of it without 3 even being paid, on the side, not full time 4 but part time, and she was permitted to do so 5 by her role. 6 And what is important is not what 7 title do you have in your official job, but 8 what are you doing. And what Mr. O'Grady was 9 doing according to his testimony and what Mr. 10 O'Grady was doing according to Judge 11 VanDerKarr's testimony throughout the entire 12 period of time while he was an attorney 13 bailiff included the practice of law. 14 Now, the weekly mediations that he 15 engaged in and the orders that he filed in 16 connection with these weekly mediations, 17 although Mr. McTigue talks generally, you 18 know, "This was the same thing that a law 19 clerk could do," he fudges the difference 20 between research and drafting, which sometimes 21 law clerks do that, and conducting a mediation 22 session in court, getting a settlement between 23 the parties, drafting an order of that 24 settlement.</p>	<p>1 was done by Mr. O'Grady as an attorney bailiff 2 was the practice of law. 3 And as I want to remind the Board, 4 we don't have the burden of proving that he 5 qualifies. The protestor had the burden of 6 proving that he doesn't qualify. And you 7 don't fulfill that duty just by making 8 arguments without evidence, and that, I 9 believe, is much of what's happening here. 10 I would remind the Board again that 11 the law requires the Board to give a liberal 12 interpretation of the phrase "engaged in the 13 practice of law." The Ohio Supreme Court has 14 ordered, through its decisions, that that is a 15 duty of boards, to give a liberal 16 interpretation of the phrase "engaged in the 17 practice of law," and the Ohio Supreme Court 18 has told boards of elections that they must do 19 that in order to give voters a choice among 20 candidates for judge. 21 You know, there are some provisions 22 of Title 35, as this board is well aware, that 23 are required to be construed strictly, that do 24 not admit a liberal interpretation, and there</p>

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<p>1 are other provisions that may be given a 2 liberal interpretation, but this is a 3 provision that the Ohio Supreme Court says you 4 are required to give a liberal interpretation, 5 to let people on the ballot and let voters 6 have a choice.</p> <p>7 Again, I don't think this is a 8 closed question, but the evidence is not 9 disputed, and the evidence certainly in our 10 view supports the notion that Mr. O'Grady has 11 the qualifications to serve as municipal court 12 judge if he is fortunate to be elected this 13 November's election. Thank you. Any 14 questions?</p> <p>15 CHAIRMAN PREISSE: Okay. Well, I 16 think we've had a full and fair discussion of 17 the issues before us for the better part of an 18 hour-plus. What time did we convene, 2:35 or 19 so, 2:40, so a little bit over an hour.</p> <p>20 Any comments by the Board for the 21 record?</p> <p>22 MR. MANIFOLD: Just my preference, I 23 don't think -- we're not up against the 24 deadline yet, are we? We're not up against --</p>	<p>1 MR. BURD: It would be the first 2 Monday of April, unless we held a special 3 meeting sometime between now and then, which 4 we could call at any time if you desired that.</p> <p>5 MR. ANTHONY: How long do you need? 6 MR. MANIFOLD: I don't know. I 7 don't need that long, but I don't know if we 8 want to have a special meeting or if we just 9 want to wait.</p> <p>10 MR. ANTHONY: We don't want to wait 11 too long, because a lot of stuff that was said 12 would be lost. I mean, I wouldn't make it 13 longer than a week, because everything you've 14 heard here today would be gone out of your 15 head, you know, you could lose a lot of the 16 testimony that just happened. So I would do 17 it quicker as opposed to later.</p> <p>18 MR. MANIFOLD: But we don't have to 19 schedule another meeting yet; we don't have to 20 figure that out yet.</p> <p>21 MR. BURD: We could figure that out 22 with you after you look at your schedules. We 23 don't have to schedule it right now.</p> <p>24 CHAIRMAN PREISSE: When's our next</p>
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<p>1 I mean, this is a fall issue.</p> <p>2 MR. BURD: This is a fall election 3 matter. It doesn't go on the primary ballot.</p> <p>4 MR. MANIFOLD: I really would like 5 to look through -- I've been trying to look 6 through this over the last hour, but I'd like 7 to kind of look into some of these cases and 8 different case law.</p> <p>9 CHAIRMAN PREISSE: I don't think 10 there's anything that would prohibit you to do 11 that, because again, my understanding is if we 12 don't do anything, nothing has been done, and 13 the status of the various candidates, 14 particularly one in question, remains 15 unaltered. So to the extent you want to 16 continue to contemplate this for further 17 attention.</p> <p>18 MR. MANIFOLD: I think I'd prefer 19 some more time just to look through.</p> <p>20 CHAIRMAN PREISSE: I deny you that 21 time.</p> <p>22 (Laughter.)</p> <p>23 MR. MANIFOLD: I guess our next 24 scheduled meeting is not till April.</p>	<p>1 regularly scheduled meeting?</p> <p>2 MR. BURD: First Monday of April, 3 whenever that day is, so it's several weeks 4 away.</p> <p>5 CHAIRMAN PREISSE: Okay.</p> <p>6 MR. ANTHONY: I would think next 7 week. That way it won't be lingering out 8 there and you won't have to call the folks 9 back in to refresh your memory of what was 10 said here today.</p> <p>11 CHAIRMAN PREISSE: Okay. Well, 12 we're going to move on with our agenda then. 13 Thank you to all the parties to this 14 matter for appearing here. Particularly 15 appreciate Mr. Colombo's participation.</p> <p>16 MR. COLOMBO: Yes. Good seeing you. 17 Thank you.</p> <p>18 -----</p> <p>19 MR. BURD: And I know you have a lot 20 on your desk, but the voting machine 21 allocation is the next item on our agenda, if 22 you can find that portion.</p> <p>23 CHAIRMAN PREISSE: Yep.</p> <p>24 MR. ANTHONY: Y'all need a little</p>

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1 background on the voting machine allocation?
 2 Because this is going to be a low turnout
 3 primary election, we decided to lower the
 4 total number of precincts -- I mean voting
 5 machines per voter -- lower the number of
 6 precincts per voter to -- what is it?
 7 MR. BURD: It's one machine for
 8 every 275 active voters. For general
 9 elections, we're required to have one machine
 10 for every 175. We're not under that
 11 requirement for the primary. Because this is
 12 expected to be very a light turnout, we think
 13 this is appropriate. It's a total of 1,948.
 14 You can see if you choose each
 15 voting location what will be open. There will
 16 be a minimum of three machines everywhere.
 17 The maximum number would be 14, and then for
 18 those precincts in between, it's one for every
 19 275.
 20 We had a meeting with all of our
 21 managers on Tuesday. They were all
 22 comfortable that this would be more than
 23 sufficient for the primary, and that's why
 24 we're asking you to approve.

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1 CHAIRMAN PREISSE: Where is that one
 2 per 175 voters? Where does that requirement
 3 reside?
 4 MR. BURD: It's a directive from the
 5 Secretary of State.
 6 CHAIRMAN PREISSE: It's a directive?
 7 MR. BURD: And the one I reviewed
 8 last week I think was from '08 or '09.
 9 CHAIRMAN PREISSE: Is that specific
 10 to us or to all --
 11 MR. BURD: It's all counties. And
 12 again, it just applies to general elections
 13 and not primaries.
 14 CHAIRMAN PREISSE: Okay.
 15 MR. BURD: We have more latitude
 16 with primaries.
 17 CHAIRMAN PREISSE: So our best
 18 professionals tell us it's going to be light
 19 enough that we can go -- what is it?
 20 MR. ANTHONY: Mr. Chair, plus
 21 there's not that many items on the ballot. In
 22 some cases, there would only be city council,
 23 maybe a couple levies. In some cases, there's
 24 just issues. So it's not like we're going to

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1 be in there long to vote. So we just decided
 2 not to allocate.
 3 CHAIRMAN PREISSE: I see. Okay.
 4 Makes sense. Saves money. Democrats saving
 5 money, I like it. It's so rare -- that's not
 6 on the record.
 7 MR. MANIFOLD: Does it save money?
 8 CHAIRMAN PREISSE: It should.
 9 MR. BURD: It does. You know, we
 10 have to haul the machines, and we're going to
 11 talk about that in a few minutes, so it has
 12 the potential to save us money. And we have
 13 the same number of poll workers as we would if
 14 there were a dozen machines, but we will have
 15 to haul less machines there and back.
 16 MR. MANIFOLD: Mr. Chairman, I move
 17 that the Board of Elections approve the
 18 allocation of 1,948 voting machines to be in
 19 use for the May 3rd, 2011 primary election.
 20 MR. ANTHONY: Is there a second?
 21 MR. COLLEY: Second.
 22 MR. ANTHONY: All those in favor,
 23 say aye.
 24 MEMBERS: Aye.

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1 -----
 2 MR. ANTHONY: The next item on the
 3 agenda is, we're going to renew our contract
 4 with EMCS, Election Management & Consulting
 5 Services. We have a renewal clause in the
 6 contract, and we have a contract in front of
 7 you.
 8 MR. BURD: This is the company that
 9 provides all of the service to our integrity
 10 voter registration system. And this is the
 11 same contract that was approved by the Board
 12 last year. It's pretty standard. It's what
 13 we've done regularly over the years. And it's
 14 a company that we feel has provided a very
 15 good level of service since we've had that
 16 system.
 17 CHAIRMAN PREISSE: Okay. Anybody
 18 have any thoughts, questions? It's your
 19 recommendation that it makes sense, right?
 20 MR. ANTHONY: Yes, sir.
 21 CHAIRMAN PREISSE: And if we agree?
 22 MR. ANTHONY: Then we will entertain
 23 a motion.
 24 MR. COLLEY: Mr. Chairman, I move

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<p>1 that the Board of Elections extend its current 2 contract with Election Management & Consulting 3 Services, LLC, for calendar year 2011 and 4 instruct the fiscal officer to open a purchase 5 order in the amount of \$42,000 for the support 6 and maintenance of the integrity voting system 7 under the current agreement for service. 8 MR. ANTHONY: Is there a second? 9 MS. MARINELLO: Second. 10 MR. ANTHONY: All those in favor, 11 say aye. 12 MEMBERS: Aye. 13 CHAIRMAN PREISSE: Thank you. 14 ----- 15 MR. ANTHONY: We also want to extend 16 the contract of EE Ward Moving & Storage 17 Company. They're currently the vendor that 18 makes sure all the voting machines are dropped 19 off and picked up at all the voting locations. 20 And again, we have a renewal clause in the 21 current contract. 22 CHAIRMAN PREISSE: If they're good 23 with you, they're good with me. 24 MR. ANTHONY: Is there a motion?</p>	<p>1 MR. ANTHONY: Zach Manifold. 2 MR. MANIFOLD: Yes. 3 MR. ANTHONY: Doug Preisse. 4 CHAIRMAN PREISSE: Yes. 5 MR. ANTHONY: And Mr. Colley. 6 MR. COLLEY: Yes. 7 ----- 8 Thereupon, Executive Session was 9 held from 4:05 o'clock p.m. to 10 4:19 o'clock p.m. 11 ----- 12 MR. ANTHONY: We need a motion to 13 come out of executive session. There were no 14 votes taken, no motion made or voted on in 15 executive session. 16 MS. MARINELLO: So moved. 17 CHAIRMAN PREISSE: Okay. Oh, -- 18 MR. MANIFOLD: Mr. Chairman, I move 19 that the Board come out of executive session, 20 and no decisions were made or motions or votes 21 taken. 22 MR. ANTHONY: Is there a second? 23 MS. MARINELLO: Second. 24 MR. COLLEY: Second.</p>
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<p>1 MS. MARINELLO: Mr. Chairman, I move 2 that the Board of Elections extend its current 3 contract with EE Ward Moving & Storage 4 Company, LLC, for calendar year 2011 and 5 instruct the fiscal officer to open a purchase 6 order for the actual charges incurred up to 7 the max up of \$92,000 for transporting of 8 voting machines under the terms specified in 9 ITB 2010-51-03. 10 MR. ANTHONY: Is there a second? 11 MR. COLLEY: Second. 12 MR. ANTHONY: All those in favor? 13 MEMBERS: Aye. 14 MR. ANTHONY: At this time, we'd 15 like to go into executive session to discuss 16 personnel and compensation. 17 MR. MANIFOLD: Mr. Chairman, I move 18 that the Board move into executive session to 19 discuss the appointment and compensation of 20 public employees. 21 MR. ANTHONY: Roll call. Kim 22 Marinello. 23 MS. MARINELLO: Yes. 24 MR. COLLEY: Second.</p>	<p>1 MR. ANTHONY: Mr. Colley. Roll 2 call. Kim Marinello. 3 MS. MARINELLO: Here. 4 MR. ANTHONY: Zach Manifold. 5 MR. MANIFOLD: Here. Yes. 6 MR. ANTHONY: Doug Preisse. 7 CHAIRMAN PREISSE: Yes. 8 MR. ANTHONY: Michael Colley. 9 MR. COLLEY: Yes. 10 ----- 11 MR. ANTHONY: We are now out of 12 executive session. The first item of business 13 is employee compensation. Is there a motion? 14 MR. MANIFOLD: Mr. Chairman, I move 15 that the Board of Elections authorize a pay 16 rate increase adjustment of one and a half 17 percent for all full-time employees of the 18 Board of Elections, including seasonal 19 employees Brie Santone and Julie Kyle, 20 retroactive to the pay period ending on 21 January 30th, 2011. 22 MR. ANTHONY: Is there a second? 23 MR. COLLEY: Second. 24 MR. ANTHONY: All in favor, say aye.</p>

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1 MEMBERS: Aye.
 2 -----
 3 MR. ANTHONY: We also have another
 4 motion to go with ongoing purchases that we
 5 at the Board buy. Do we have a motion for
 6 that?
 7 MR. COLLEY: Mr. Chairman, I move
 8 that the Board of Elections approve the
 9 ongoing purchase of health and sanitary items
 10 as needed.
 11 MR. ANTHONY: Is there a second?
 12 MS. MARINELLO: Second.
 13 MR. ANTHONY: All those in favor,
 14 say aye.
 15 MEMBERS: Aye.
 16 -----
 17 MR. ANTHONY: That concludes our
 18 business. Is there a motion to adjourn?
 19 MR. MANIFOLD: Mr. Chairman, I move
 20 that the Board adjourn.
 21 MR. ANTHONY: Is there a second?
 22 MS. MARINELLO: Second.
 23 MR. ANTHONY: All those in favor?
 24 MEMBERS: Aye.

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1 MR. ANTHONY: We stand adjourned.
 2 -----
 3 Thereupon, the proceedings were
 4 concluded at 4:21 o'clock p.m.
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1 CERTIFICATE
 2
 3 The undersigned do hereby certify that
 4 the foregoing proceedings were digitally
 5 recorded, electronically transmitted, and
 6 transcribed via audible playback, and that
 7 the foregoing transcript of such proceedings
 8 is a full, true and correct transcript of
 9 the proceedings as so recorded.
 10
 11 IN WITNESS WHEREOF, I have hereunto set
 12 my hand and affixed my seal of office at
 13 Columbus, Ohio, on this ____ day of
 14 _____, 2011.
 15
 16
 17
 18 _____
 MICHELLE K. SALINAS
 Certified Digital Reporter
 Notary Public - State of Ohio.
 My commission expires July 17, 2013.
 19
 20
 21
 22
 23 _____
 DONNA J. BELLOUS
 Certified Digital Transcriber
 24