

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

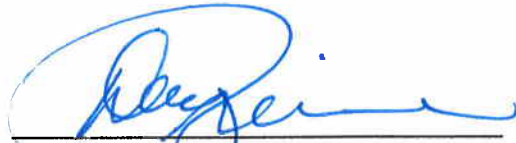
MINUTES OF THE MEETING ON

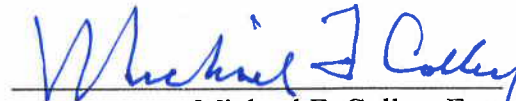
3-10-11

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



