NBCON-REP

BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO AS THE DULY CONSTITUTED ELECTORAL BOARD FOR THE HEARING AND PASSING UPON OBJECTIONS TO THE NOMINATION PAPERS OF CERTAIN CANDIDATES FOR THE NOVEMBER 3, 1998 GENERAL ELECTION IN THE CITY OF CHICAGO

Objections of: Wayne Martin	)	
	)	
To the Nomination	)	
Papers of: John J. Curry	)	
	)	No.: 98-EB-RES-004
Candidate of the Republican Party for the Office of	)	
Representative in the General Assembly for the 33rd	)	
Representative District, State of Illinois	)	
	)	

FINDINGS AND DECISION

The duly constituted Electoral Board, consisting of Board of Election Commissioners of the City of Chicago Commissioners Langdon D. Neal, Richard A. Cowen, and Theresa M. Petrone, organized by law in response to a Call issued by Langdon D. Neal, Chairman of said Electoral Board, for the purpose of hearing and passing upon Objections of Wayne Martin to Nomination Papers of John J. Curry, Candidate of the Republican Party for the office of Representative in the General Assembly for the 33 Representative District of the State of Illinois, having convened on June 1, 1998, in City Hall, 121 North LaSalle Street, Chicago, Illinois, and having heard and determined the Objections to the Nomination Papers in the above entitled matter, finds that:

1. On May 15, 1998, there was filed with the State Board of Elections certain nomination papers (the "Nomination Papers") purporting to fill a vacancy in nomination of the Republican Party for the office of Representative in the General Assembly in and for the 33rd Representative District of the State of Illinois by nominating John J. Curry (the "Candidate") as a candidate for said office.

2. Objections to the Nomination Papers of the Candidate ('Objector's Petition") herein were duly and timely filed by Wayne Martin ("Objector").

3. The said Electoral Board has been legally constituted according to the laws of the State of Illinois.

4. A Call to the hearing on said Objections was duly issued by the Chairman of the Electoral Board and served upon the members of the Electoral Board, the Objector and the Candidate, by certified mail and by Sheriff's service, as provided by statute.

5. A public hearing was held on these Objections commencing on June 1, 1998 and was continued from time to time.

6. The following persons, among others, were present at such hearing: the members of the Electoral Board, the Objector, by counsel; and the Candidate, by counsel.

7. The Board assigned this matter to Hearing Examiner Cheryl Blackwell Bryson for further hearings and proceedings.

8. The Objector's Petition alleges that, upon information and belief, certain member(s) of the Representative Committee of the Republican Party for the 33rd Representative District (hereinafter the "Committee") were not notified of the Committee's organizational meeting or of the meeting at which the Candidate was purportedly nominated to fill a vacancy in nomination, in violation of the Election Code.

9. The Hearing Examiner heard the testimony of witnesses, examined the evidence submitted, heard the argument of the parties and made recommended findings and a decision to the Board. Following argument before the Board under Rule 20 of the Board's rules of procedure, the Board remanded the case to the Hearing Examiner to take additional evidence and consider additional legal authorities. Upon conclusion of the remanded proceedings, the Hearing Examiner on June 25, 1998, issued her recommended findings and decision on remand.

10. The Objector again filed a request under Rule 20 of the Board's rules of procedure to directly address the Board regarding the Hearing Examiner's recommended findings and decision.

11. At the July 7, 1998 meeting of the Board set for hearing the parties pursuant to a Rule 20 request, Chairman Neal disclosed on the record certain facts regarding a possible disqualification from further participation in the case. Following disclosure, the parties were asked whether they objected to Chairman Neal's continued participation in the case. The Objector indicated on the record that he did not object to Chairman Neal's continued participation in the case. The Candidate subsequently indicated by letter that he did not object to Chairman Neal's continued participation in the case. The other members of the Electoral Board concurred on the record that Chairman Neal should not be disqualified from further participation in the case. See, e.g., *In re Objections of Cook*, 122 Ill.App.3d 1068, 1072, 462 N.E. 2d 557, 560 (1984) (held that allegations of political bias levied against electoral board members were insufficient to compel a substitution of board member or a change of venue); *Ryan v. Landek*, 159

Ill.App.3d 10, 512 N.E.2d 1 (First Dist. 1987) (the Election Code does not provide for substitution when an objector alleges political bias).

12. The Board accepts in part, and rejects in part the recommended findings and legal conclusions of the Hearing Examiner as more fully set forth below.

13. The Board finds in relevant part that:

A. The Representative Committee of the 33rd Representative District for the Republican Party (the "Committee") met on May 14, 1998, to fill a vacancy in nomination that existed for the Republican Party for the office of Representative in the General Assembly for the 33rd Representative District of the State of Illinois. The Committee nominated John J. Curry to fill the vacancy in nomination.

B. The testimony of the Candidate was that prior to the May 14, 1998 meeting of the Committee, he provided written notice to all of the other nine members of Committee (the Candidate was the tenth member of the Committee) of the time, date and place of the Committee's organizational meeting and its meeting to nominate a Republican candidate for the office of Representative Committee by depositing such notice in the United States Mail, first class postage prepaid, addressed to each of the member of the Committee at their last known addresses. The Candidate testified that he listed his home address as the return address, but the U.S. Postal Service returned none of the mailed notices to the Candidate. The Candidate also testified that he marked an "E" next to the names of each of the Committee members on a list of Committee members' names and addresses every time that he addressed an envelope for that member. He also testified, somewhat inconsistently, that he marked a "✓" next to name of each member on the mailing list after he had stuffed and stamped the envelope or after he had deposited the envelope into the mail box.

C. Mr. Frank Capuzi and Mr. Epifanio Santos, two members of the Committee, did not receive the notice purportedly mailed to them by the Candidate.

D. The Candidate testified that he attempted to telephone each of the other nine members of the Committee. However, Mr. Capuzzi and Mr. Santos did not receive the telephone notice purportedly attempted by the Candidate.

E. Mr. Capuzi did not recall ever being given verbal notice of the date, time and place of the Committee's meeting by Ms. Lisa Shyldowski, Executive Director of the Cook County Republican Party, while attending a meeting to fill a vacancy in another district.

F. Neither Mr. Capuzi nor Mr. Santos attended the meeting of the Committee at which the Candidate was nominated and did not know of the meeting until after it had taken place.

G. Sections 7-61 and 8-17 of the Election Code (10 ILCS 5/7-61 and 5/8-17) govern the filling of vacancies of nomination for the office of Representative in the General Assembly by the appropriate representative committee of a political party if there was no candidate for the nomination of that party in the primary. Section 8-5 of the Election Code (10 ILCS 5/8-5) governs the organization and meeting requirements of "representative committees." These statutes, however, do not prescribe the manner in which members of the representative are to be notified of the meeting at which they become organized and/or at which they nominate to fill vacancies in nomination.

H. Whether expressly required by statute or not, some form of prior notice of a meeting of a representative committee must be given to the members of the representative committee. See *Graham v. State Officers Electoral Board*, 269 Ill.App.3d, 646 N.E.2d 1357 (Fourth Dist. 1995). However, *Graham* does not prescribe the time or manner of providing such prior notice of representative committee meetings.

14. In addition to the findings stated in paragraph 13, Commissioner Petrone also finds that:

A. Because two of the nine Committee members to whom first class mail notice was allegedly given did not actually receive such notice, first class mail is inadequate and legally insufficient.

B. *Graham* requires that, at a minimum, notice be given by certified mail and that is the least restrictive alternative designed to give members of a representative committee adequate notice of meetings.

15. In addition to the findings stated in paragraph 13, Chairman Neal also finds that:

A. First class mail is reasonably calculated to give notice to interested parties and, if given, is legally sufficient notice to the members of a representative committee under *Graham*.

B. It is not clear from the record that first class mail notice was actually sent by the Candidate and the fact that two of the nine members of the Committee did not actually receive the notice that was allegedly mailed by the Candidate is evidence that such notice was, in fact, never given.

16. The Board finds that proper and legally sufficient notice of the May 14, 1998 Committee meeting at which the Candidate was nominated to fill a vacancy in

nomination for the office in question was not given to each of the Committee members. As a result of the failure to give proper and legally sufficient notice of the Committee meeting, the Candidate's nomination is invalid.

17. For the reasons stated, the Board sustains the objections set forth in the Objector's Petition and finds the Candidate's Nomination Papers to be invalid.

IT IS THEREFORE ORDERED that the Objections of Wayne Martin, to the Nomination Papers of John J. Curry, Candidate of the Republican Party for the office of Representative in the General Assembly for the 33rd Representative District of the State of Illinois, are hereby SUSTAINED and said Nomination Papers are hereby declared INVALID and the name of John J. Curry, Candidate of the Republican Party for the office of Representative in the General Assembly for the 33rd Representative District of the State of Illinois SHALL NOT be printed on the ballot for the General Election to be held on November 3, 1998.

Dated: Chicago, Illinois, this 14th day of July, 1998.

Langdon D. Neal, Chairman

Theresa M. Petrone, Commissioner/Member

Commissioner/Member Richard A. Cowen, dissenting:

1. The statutes in question do not specify what type of notice is required for a meeting of the Representative Committee. The decision of the U.S. Supreme Court in *Mullane v. Central Hanover Bank & Trust, et al.*, 339 U.S. 306, 70 S.Ct. 652 (1950), holds that notice is sufficient if it is "reasonably calculated" to be received by interested parties. The Court expressly states that first class mail meets this test.

2. The use of first class mail to provide notice has also been held to be adequate notice by Illinois courts. See, e.g., *Guerrero v. Ryan,* 272 Ill.App.3d 945, 651 N.E.2d 596 (First Dist. 1995).

3. Actual receipt of notice is not required, either by statute or pursuant to either of the above cases. To require actual receipt of the notice not only goes beyond the Illinois statutes and case precedent, but also opens the door to a dissident member of any Committee frustrating the legitimate purposes behind the statute by avoiding receipt of notice.

4. The U.S. Supreme Court ruled in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564 (1983), that when considering objections to ballot access, the Court, or in this case the Electoral Board, must adopt the least restrictive method. First class mail satisfies this test as it is the least restrictive method of notice.

5. The Hearing Officer found that notice was sent by Mr.. Curry to each member of the Committee informing them of the date, time and place of the May 14, 1998 Committee meeting by first class mail, postage prepaid and addressed to each member of the Committee at their last known address. In addition, Mr. Curry testified that the envelopes contained his return address but no mailings were returned to him.

   A. The Objector challenges the mailing based on the claim that Mr. Curry's testimony is not credible. However, the Hearing Officer, who had the opportunity to hear his testimony and observe his demeanor while testifying, found his testimony credible. The Hearing Officer is best able to judge and resolve issues of credibility, and there is no basis in this case for this Electoral Board to substitute its judgment for that of the Hearing Officer.

   B. In light of the findings by the Hearing Officer that Mr. Curry did mail the notices to all members of the Committee, the burden of proof remains on the Objector to prove that first class mail is not a method "reasonably calculated" to provide notice. The Objector failed to satisfy his burden of proof in this regard.

   C. Under no circumstances is the Candidate required to prove mailing by clear and/or convincing evidence. At most, his burden is to prove mailing by a preponderance of the evidence. At most, his burden is to prove mailing by a preponderance of the evidence, and this burden was met as found by the Hearing Officer and supported by the record.

6. The testimony of Frank Capuzi and Epifanio Santos is entirely consistent with the recommended order of the Hearing Officer. Mail will sometimes go astray, but this does not negate the conclusion (joined in by Chairman Neal) that first class mail is the appropriate standard, or that Mr. Curry did, in fact, mail the notices to each Committee member (as found by the Hearing Officer).

7. Even if this were viewed as a case where reasonable minds could differ, then well established principles of law favoring ballot access should apply to deny the Objections.

8. Therefore, I would accept the Hearing Examiner's recommended findings and decision, overrule the Objections to the Candidate's Nomination Papers, find that such papers are valid, and certify John J. Curry to the ballot.

Richard A. Cowen, Commissioner/Member

NOTICE: Pursuant to Section 10-10.1 of the Election Code (10 ILCS 5/10-10.1) a party aggrieved of this decision and seeking judicial review of this decision must file a petition for judicial review with the Clerk of the Circuit Court of Cook County within 10 days after the decision of the Electoral Board.