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BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO AS THE DULY CONSTITUTED ELECTORAL BOARD

Objections of: JOSEPH MARTINEZ	)
	)
To the Nomination	)
Papers of: CARLOS ORTIZ	)
	) No. 04-EB-WC-61
Candidate for the office of Ward Committeeman for	)
the 31st Ward of the City of Chicago, Republican	)
Party	)

FINDINGS AND DECISION

The duly constituted Electoral Board, consisting of Chicago Board of Election Commissioners Langdon D. Neal, Theresa M. Petrone, and Richard A. Cowen, 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 ("Objections") of JOSEPH MARTINEZ ("Objector") to the nomination papers ("Nomination Papers") of CARLOS ORTIZ, candidate for election to the office of Ward Committeeman for the 31st Ward of the City of Chicago, Republican Party ("Candidate"), having convened on January 5, 2004, at 2:00 p.m., in the City Council Chambers, 121 North LaSalle Street, 2nd Floor, Chicago, Illinois; and having heard and determined the Objections to the Nomination Papers in the above-entitled matter finds that:

1. Objections to the Nomination Papers of the Candidate herein were duly and timely filed.

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

3. 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 registered or certified mail and by Sheriff's service, as provided by statute.

4. A public hearing held on these Objections commenced on January 5, 2004 and was continued from time to time.

5. The Electoral Board assigned this matter to Hearing Examiner RODNEY W. STEWART for further hearings and proceedings.

6. The Objector and the Candidate were directed by the Electoral Board to appear before the Hearing Examiner for a hearing on the date and at the time designated on the Electoral Board's docket. The following persons, among others, were present at such hearing: the Objector, JOSEPH MARTINEZ, by his attorney; and the Candidate, CARLOS ORTIZ, by his attorney.

7. The Objections allege that the Candidate is not a resident at the address shown on the Nomination Papers and that his Statement of Candidacy is false and invalid.

8. The Hearing Examiner conducted an evidentiary hearing on the issue whether the Candidate resided at the address shown on his Nomination Papers. Pursuant to a request to produce documents made by the Objector, the Candidate did produce documents that tended to show that he did reside at the address shown on his nomination papers. The Objector produced no evidence of his own. The Objector has the burden of proving the allegations contained in his Objections. The Hearing Examiner concluded that the Objector failed to meet the burden of proving that the Candidate did not reside at the address shown on his Nomination Papers and that this objection should be overruled.

9. The Objections also allege that the Candidate is not affiliated with the Republican Party because he has consistently voted in Democratic Party primary elections.

10. The Electoral Board finds that:

A. Section 7-10 of the Election Code (10 ILCS 5/7-10) requires that a statement of candidacy shall state that the candidate is a "qualified primary voter" of the party to which the petition relates.

B. The Election Code does not contain a definition of what constitutes a "qualified primary voter." However, Section 3-1.2 of the Code does define a "qualified primary elector" as someone who is registered to vote at the address shown opposite his signature on a petition or was registered to vote at such address when he signed a petition.

C. Section 7-43(d) of the Election Code provides that no person shall be entitled to vote in a primary election if he or she has voted at a primary held under Article 7 of another political party within a period of 23 calendar months next preceding the calendar month in which such primary is held. However, these provisions of Illinois law were struck down as unconstitutional by the United States Supreme Court in *Kusper v. Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed. 2d 260 (1973).

D. In *Sperling v. County Officers Electoral Board,* 57 Ill.2d 81, 309 N.E.2d 589 (1974), the Illinois Supreme Court considered the impact of *Kusper* upon eligibility to sign nominating petitions and to be a candidate for nomination. The court noted that the language of Section 7-43(d), ruled invalid in *Kusper*, relating

to voters, and the language of Section 7-10, relating to signers of nominating petitions, speak in terms of 'qualified primary elector' while the language of section 7-10 as to candidates speaks in terms of 'qualified primary voter.' While noting this disparity, the court held that within the context in which the phrases appear, the disparity is not significant and the phrases have the same meaning. 57 Ill.2d 81 at 83, 309 N.E.2d 589 at 590-91. The court determined that the rationale of *Kusper* was applicable to those provisions of Section 7-10 insofar as it imposed a 2 year restriction upon voters who desired to sign primary nominating petitions and consequently held the restriction to be invalid. As to the question presented by the 2 year restriction upon changes of party by those who are candidates in primary elections, the court observed that 'We believe that the standards governing party changes by candidates may and should be more restrictive than those relating to voters generally. It seems to us clear that the State's interest in preserving the integrity of the political process will support a reasonable restriction upon party-switching by candidates, . . .' The court concluded, however, that since the statute provided 'substantially similar' restrictions for all 3 categories (i.e. voters, voters who signed primary nominating petitions, and voters who wish to be candidates), the constitutional validity of the restriction on candidates was not severable from the balance of the legislative scheme and consequently fell with the other portions.

E. In *Dooley v. McGillicudy,* 63 Ill.2d 54, 60, 345 N.E.2d 102, 105 (1976), the court held that 'the result in *Kusper* and *Sperling* and the absence of curative legislation was to render inoperable those restrictions upon candidates in a party primary and voters who signed primary petitions concerning those individuals' prior political affiliations.'

11. The Objector cites to Title 26, Illinois Administrative Code, Section 107.110, as one way a candidate's voting records is disclosed to the voters and to petition signers. However, this section of the Code is a State Board of Elections' rule pertaining to how voting history in a primary election is to be accumulated and reported. See, e.g., 10 ILCS 5/6-66. Nothing in this rule or in the statute it purports to implement prevents the "party switching" that Objector complains of and certainly does not overrule the *Kusper*, *Sperling* and *Dooley* cases.

12. The Objector also argues that the holdings in the *Kusper*, *Sperling* and *Dooley* cases do not apply to the Candidate here because he is seeking a "political" office and not a "public" office. However, nothing in those cases suggests that the holding or reasoning in those cases is any less applicable to a "political" office such as Ward Committeeman as they are to any other office. To the extent that the Objector wants the Electoral Board to carve out an exception to those cases solely on the basis that the office in question is a "political" one as opposed to a "public" one, this Board is without authority to do so.

13. The Objector also raises constitutional interests of freedom of political association, arguing that the rights of a political party to protect itself from party

raiding by an opposing political party having the intent to control the opposing party's effectiveness in the Ward should be taken into consideration. Essentially, the Objector argues that the effects of the *Kusper*, *Sperling* and *Dooley* cases must be ignored in order to re-impose "party switching" restrictions in the narrow instance where the candidate is seeking a political office.

However, this argument ignores that fact that the State did have requirements intended to prevent "party switching" and "party raiding," but those requirements were struck down as unconstitutional and the State has made no effort to re-enact new requirements. To the extent that the Objector wants this Electoral Board to impose new requirements under the guise of protecting the constitutional rights of the political parties, even after the courts in this country have struck such requirements as unconstitutional and the legislature has not chosen to act, this Board cannot do so. An electoral board may only exercise the powers conferred upon it by the legislature. *Kozel v. State Board of Elections*, 126 Ill.2d 58, 533 N.E.2d 796 (1988).

The Objector also claims that a political party may, under the First Amendment to the U.S. Constitution, impose restrictions to prevent party raiding notwithstanding State requirements to the contrary. However, an electoral board does not have the power to entertain constitutional challenges. *Tobin v. Illinois State Board of Elections,* 105 F. Supp.2d 882, 886 (N.D. Ill. 2000), *aff'd*, 268 F.3d 517 (7th Cir. 2001); Phelan *v. County Officers Electoral Board*, 240 Ill.App.3d 368, 372-373, 608 N.E.2d 215, 217 (First Dist. 1992); *Wiseman v. Elward*, 5 Ill.App.3d 249, 382 N.E.2d 282, (First Dist. 1972); *Troutman v. Keys*, 156 Ill.App.3d 247, 509 N.E.2d 453 (First Dist. 1987).

14. The Electoral Board finds that as a result of the decisions in *Kusper*, *Sperling* and *Dooley* and further as the result of the legislature's inaction in replacing the unconstitutional statute, there is currently no restriction on a candidate declaring himself a "qualified primary voter" of a political party on his or her statement of candidacy even though he or she may have previously voted in the primary of another party.

15. The Electoral Board therefore finds that the Objector's objections as to the Candidate's political party affiliation are overruled.

16. Upon review of the Hearing Examiner's recommended findings concerning the Candidate's residency in the ward, the Electoral Board reversed such findings and remanded this matter back to the Hearing Examiner for further proceedings solely on the issue of the Candidate's residency.

17. On remand, the Hearing Examiner conducted a hearing on February 10, 2004. The attorney for the Candidate, after waiting for the Hearing Examiner who was delayed, left before the hearing started but left a stack of documents with the

clerk. The Hearing Examiner refused to consider these documents without a proper offer and foundation by the Candidate's attorney.

18. The Hearing Examiner scheduled another hearing on February 11 to allow the Candidate's attorney to attend. The Candidate's attorney was notified of the February 11 hearing but failed to attend. The hearing proceeded and the Objector introduced a copy of the Candidate's Illinois driver's license listing the Candidate's old address. The Objector also introduced a certified copy of a change of address from the Chicago Board of Election Commissioners date-stamped December 27, 2003, which is after the deadline for filing his nomination papers.

19. After reviewing the evidence as well as the transcript from the Rule 20 hearing before the Board, the Hearing Examiner concluded that the Objector met his burden of proof that the Candidate was not a resident of the 31st Ward at the time he filed his Nomination Papers.

20. The Electoral Board adopts the Hearing Examiner's recommended findings and conclusions of law as to the residency of the Candidate and finds that the Objections as to the Candidate's residency are sustained.

IT IS THEREFORE ORDERED that the Objections of JOSEPH MARTINEZ to the Nomination Papers of CARLOS ORTIZ, candidate for election to the office of Ward Committeeman for the 31st Ward of the City of Chicago, Republican Party, are hereby SUSTAINED and said Nomination Papers are hereby declared INVALID and the name of CARLOS ORTIZ, candidate for election to the office of Ward Committeeman for the 31st Ward of the City of Chicago, Republican Party, SHALL NOT be printed on the official ballot for the General Primary Election to be held on March 16, 2004.

Dated: Chicago, Illinois, this 12th day of February 2004.

Langdon D. Neal, Chairman

Theresa M. Petrone, Commissioner

Richard A. Cowen, Commissioner

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.